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No. 12548

2643

United States  
Court of Appeals  
for the Ninth Circuit.

*Accord 2643*  
WOODWORKERS TOOL WORKS, a Corporation,

Appellant,

vs.

WILLIAM J. BYRNE,

Appellee.

SUPPLEMENTAL  
Transcript of Record

Appeal from the United States District Court,  
Southern District of California,  
Central Division.

FILED

SEP 22 1950

PAUL P. O'BRIEN, CLERK



No. 12548

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United States  
Court of Appeals  
for the Ninth Circuit.

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WOODWORKERS TOOL WORKS, a Corporation,

Appellant,

vs.

WILLIAM J. BYRNE,

Appellee.

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SUPPLEMENTAL  
Transcript of Record

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Appeal from the United States District Court,  
Southern District of California,  
Central Division.





District Court of the United States for the Southern  
District of California, Central Division  
Civil Action File No. 9134-Y

WILLIAM J. BYRNE,

Plaintiff,

vs.

WOODWORKERS TOOL WORKS, a Cor-  
poration,

Defendant.

SUMMONS

To the above-named Defendant :

You are hereby summoned and required to serve upon John W. Olson, plaintiff's attorney, whose address is 639 South Spring Street, Los Angeles 14, California, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

EDMUND L. SMITH,  
Clerk of Court.

[Seal] By /s/ G. A. SAUNDERS,  
Deputy Clerk.

Date: January 26, 1949.

## Return on Service of Writ

United States of America,  
Southern District of California—ss.

I hereby certify and return that I served the annexed Summons and Complaint on the therein-named Elmer Preuer as agent for Woodworkers Supply Company by handing to and leaving a true and correct copy thereof with Elmer Preuer personally at Los Angeles, Calif., in said District on the 27th day of Jan., 1949.

JAMES J. BOYLE,  
U. S. Marshal.

By /s/ EARLE L. BAUGHER,  
Deputy.

[Endorsed]: Filed Feb. 2, 1949.

Los Angeles, California, Monday, March 21, 1949  
10:00 A.M.

Before: Hon. Leon R. Yankwich,  
Judge.

Appearances:

JOHN W. OLSON,  
Attorney for Plaintiff.

TRIPP & CALLAWAY, by  
ROBERT E. DUNNE,  
Attorneys for Defendant.

TRANSCRIPT OF THE HEARING ON MO-  
TION TO DISMISS ACTION AND QUASH  
RETURN OF SERVICE OF SUMMONS

The Court: This shows a service on Elmer Preuer, as agent for Woodworkers Supply Co.

Mr. Dunne: Your Honor, the service was made upon Mr. Preuer. We have the affidavit of Mr. Preuer that he is not an officer, a managing or general agent, or an agent authorized by appointment or law to receive process——

The Court: How does he appear to be doing business, under the same name?

Mr. Dunne: There was a different name. The parties served in this action were the Woodworkers Supply Company.

The Court: The action is for personal injuries caused by defective machinery?

Mr. Dunne: That is correct.

The Court: I will hear from the other side.

Mr. Olson: I would like to call the Court's at-

tention to the affidavit of the defendant, the moving party. There is no evidence of the fact that the Woodworkers Tool Works was not doing business within the state and the Woodworkers Supply Company was not their agent for that business. I submit that the affidavits speak for themselves.

The Court: We have the same situation in music cases, where we have men who merely solicit music for publication. They are not agents. All of the billing is done from a distance, and we have all held that they are not doing business. I have a long list of California cases dealing with this problem. The last case is *West Publishing Company vs. Superior Court*, 20 Cal. 2d, 720.

Mr. Olson: In this case, your Honor, our investigation and the affidavits on file and the exhibits indicate and prove that the Woodworkers Supply Company did bill them and the Woodworkers Supply Company made all the collections. There are no facts here submitted by the moving party that they are not doing business within the state, and it seems to me it is their burden of proof.

The Court: The Woodworkers Tool Company is——

Mr. Olson: The Illinois Corporation.

The Court: The Selby Company is the plaintiff's employer?

Mr. Olson: Correct, your Honor.

The Court: This case is governed by the California law, and all of these references don't help. The only case that is helpful is the case I have in front of me, the *West Publishing Company v. the Superior Court*.

Mr. Olson: I submit the Woodworkers Tool Works shows they are doing business here.

The Court: I am inclined to think that their affidavit is merely a negative in view of your positive affidavit. In the case the Thew Shovel Co. vs. the Superior Court, the identical situation arose. They were distributors although most of the contracts were entered into with the manufacturer direct. The Court held that they were doing business. And in West Publishing Company vs. the Superior Court of the City and County of San Francisco, the Supreme Court, in an opinion by Justice Curtis, went very carefully into the matter, and while there is law that ordinary solicitation might not constitute doing business, nevertheless, a continuance of doing that subjects the company to jurisdiction. It is a very elaborate opinion, concurred in by all the justices except Justice Traynor. You are merely raising the point of jurisdiction; you are merely asking me to quash the service if they are not the managing agent.

In the West Publishing Company case the man was an agent. The question was whether he was doing business in the state. Pursuant to a separate contract made with each, the exclusive right to solicit orders for its publications in California is granted by petitioner to four salesmen. In this particular case the action was commenced against the West Publishing Company, and personal service of process was made upon three of the company's salesmen operating in this state and a copy of the complaint and summons was sent by registered mail to the company's home office in St. Paul, Minnesota.

Mr. ~~Olson~~ <sup>Dunne</sup>: The affidavit has established Mr. Preuer was not connected with the company.

The Court: That is a denial. I have to take this affidavit in conjunction with their affidavit.

Mr. Olson: The affidavits are based on hearsay, and are conclusions. I feel we should have a hearing on the matter. This is entirely on affidavit.

The Court: A motion to quash summons is heard only by affidavit and answered by affidavit. You have their affidavit and you have your affidavit, and that is sufficient. We don't hold hearings on these matters. The motion will be denied. How many days do you want?

Mr. Dunne: Twenty days.

[Endorsed]: Filed April 19, 1950.

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[Endorsed]: No. 12548. United States Court of Appeals for the Ninth Circuit. Woodworkers Tool Works, a Corporation, Appellant, vs. William J. Byrne, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: May 16, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

No. 17548

No. 9134-Y.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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WOODWORKERS TOOL WORKS, INC., a corporation,  
*Appellant,*

*vs.*

WILLIAM J. BYRNE,  
*Appellee.*

---

APPELLANT'S OPENING BRIEF.

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TRIPP & CALLAWAY,  
935 Van Nuys Building, Los Angeles 14,  
*Attorneys for Appellant*

FILED  
JUL 1 1950  
PAUL P. O'BRIEN, CLERK





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No. 9134-Y.

IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

WOODWORKERS TOOL WORKS, INC., a corporation,  
*Appellant,*

*vs.*

WILLIAM J. BYRNE,  
*Appellee.*

---

**APPELLANT'S OPENING BRIEF.**

---

**Statement of Jurisdiction.**

1. The statutory provisions to sustain the jurisdiction of the District Court are U. S. Code, Title 28, Sec. 1332 [formerly the Act of Mar. 3, 1875, Chap. 137, Sec. 1, 18 Stat. 470, as amended; 28 U. S. C. A., Sec. 41(1)] providing that the "district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000 . . . and is between: (1) citizens of different states; . . ."

2. The existence of the jurisdiction is shown by the following allegations in paragraph III of the second amended complaint: "That plaintiff is a citizen of the State of California and defendant is a corporation incorporated under the laws of the State of Illinois. The matter in controversy exceeds, exclusive of interest and

costs, the sum of Three Thousand (\$3,000.00) Dollars.”  
[R. 22.]

3. The statutory provisions to sustain the jurisdiction of the Court of Appeals are U. S. Code, Section 1291 [formerly the Act of Mar. 3, 1891, Chap. 517, Sec. 6, 26 Stat. 828, as amended; 28 U. S. C. A., Sec. 225(a)] providing that the “court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .”; and U. S. Code, Section 1294 [formerly the Act of Mar. 3, 1891, *supra*; 28 U. S. C. A., Sec. 225(d)] providing that “appeals from reviewable decisions of the district . . . courts shall be taken . . . (1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . .”

### Statement of the Case.

This is an appeal by Woodworkers Tool Works, Inc., an Illinois corporation, and the defendant below, from an amended judgment entered after a jury verdict.

The second cause of action of the second amended complaint for personal injuries (the first cause of action having been dismissed [R. 35]), alleged that on October 28, 1948, while plaintiff, an employee of E. George Selby doing business as Selby Company, was engaged in cutting lumber with a new Champion panel raiser head he was injured when the said panel raiser head suddenly broke from structural defects. It was further alleged that the said panel raiser head was purchased from the defendant on October 23, 1948, and was installed for use in cutting lumber at the Selby Company plant on October 26, 1948; that defendant was negligent and careless in the manu-

facture, sale and delivery to plaintiff's employer of a structurally defective panel head [R. 22-6].

The answer of defendant denied the negligence alleged, denied that plaintiff's employer purchased said panel raiser head from the defendant and alleged that it did not cast the said panel raised head nor any part thereof. As separate defenses the defendant pleaded contributory negligence upon the part of plaintiff and unavoidable accident [R. 27-31].

Prior to the filing of the second amended complaint plaintiff had filed an amended complaint [R. 2-5] which was served on one E. H. Preuer as agent of Woodworkers Supply Company (not a party to this action) [R. 498]. The defendant Woodworkers Tool Works, Inc., a corporation, then moved for an order dismissing the action pursuant to Rule 12(b) (2-4-5) of the Federal Rules of Civil Procedure on the ground that the Court lacked jurisdiction over the person of the defendant and for insufficiency of process and of the service thereof [R. 6-11]. Said motion was denied [R. 21].

Thereafter plaintiff filed the second amended complaint. No further service of summons was effected. The defendant then moved for an order to dismiss the first count or cause of action [R. 32-4], and said motion was granted [R. 34-6].

At the conclusion of plaintiff's case defendant challenged the sufficiency of the evidence by a motion for judgment of nonsuit on the grounds that there was no evidence that the defendant sold the device to plaintiff's employer and that there was no evidence showing a causal connection between the breaking of the panel raiser head and the in-

jury sustained by the plaintiff, said motion being denied by implication [R. 226-7].

At the close of the trial the defendant moved the Court for a directed verdict on the grounds that no negligence was shown on the part of the defendant and that there was no causal connection between the defect, if any, of the device and the injuries sustained by the plaintiff [R. 425-6]. Reserving ruling on the motion until after the verdict [R. 428] the Court subsequently denied the motion.

The jury returned its verdict in favor of the plaintiff and against the defendant fixing plaintiff's special damages at Eight Thousand Dollars and fixing plaintiff's general damages at One Thousand Dollars [R. 54]. Defendant then moved for a judgment *non obstante veredicto* or in the alternative for a new trial upon the grounds (1) that the verdict was contrary to law, (2) that the evidence was insufficient to justify the verdict and (3) that the Court erred in not granting the motion for nonsuit and in instructing the jury on the doctrine of *res ipsa loquitur* [R. 56]. This motion was likewise denied.

A motion was made by plaintiff to amend the verdict to fix the plaintiff's special damages at \$1,000.00 and plaintiff's general damages at \$8,000.00 [R. 62]. In support of the motion plaintiff produced an affidavit of George F. Caldwell, foreman of the jury, to the effect that an error was made in filling in the amounts awarded [R. 64]. The motion was granted and an amended judgment was filed fixing the special damages at \$1,000.00 and the general damages at \$8,000.00 [R. 67].

The facts as adduced at the trial reveal that on October 28, 1948, the plaintiff, William J. Byrne, was employed by the Selby Company, manufacturers of sash and doors



[R. 78]. On the morning of October 28, 1948, he was engaged in operating a shaper when he heard a faint click [R. 142, 165]. He then dropped below the table top and stopped the machine [R. 142, 151, 154]. He remained under the table until "things had stopped dropping" and then got up and first looked at the damaged machine and then discovered that his right hand and little finger were cut [R. 143]. He was then taken to a doctor where the hand was treated [R. 146].

The shaper involved had attached to it a Champion panel raiser head which is a device used to bevel panels [R. 140]. It is the contention of the plaintiff in his complaint that the said panel raiser head, revolving at hundreds of revolutions per minute, suddenly broke from structural defects, a piece of which struck plaintiff [R. 23]. An inspection of the panel raiser head revealed that the casting was broken in two pieces [R. 84], however, plaintiff was not conscious of any object striking him [R. 160] and he did not know what cut his hand [R. 171].

The Champion panel raiser head in question was manufactured by the defendant Woodworkers Tool Works, Inc., an Illinois corporation, located at 222 South Jefferson Street, Chicago, Illinois [R. 272].

One Jerome B. Townsend, a salesman for the Woodworkers Supply Company of Los Angeles, California [R. 249], a retailer of woodworking machinery and supplies [R. 251], testified that he took the order from Selby Company for the purchase of the Champion panel raiser head [R. 249]. He related that he showed the plant superintendent of Selby Company a catalogue published by the Woodworkers Tool Works, Inc., of Chicago, Illinois [R. 260], and that Selby Company specified that it was the

Champion brand of panel raiser head that Selby Company wanted [R. 255]. The Woodworkers Supply Company carried no panel raiser heads in stock [R. 251] but sent an order to the Woodworkers Tool Works, Inc., and requested that the Champion panel raiser head be shipped direct to Selby Company [R. 249]. It was further testified that Woodworkers Supply Company handles hundreds of products other than those manufactured by Woodworkers Tool Works, Inc., and that the latter corporation owns no interest in nor has anything to do with fixing the policy of Woodworkers Supply Company [R. 251]. Woodworkers Tool Works, Inc., billed Woodworkers Supply Company for the Champion panel raiser head [R. 275] and the latter company billed Selby Company [R. 266].

Selby Company received the Champion panel raiser head on October 25, 1948, via air express [R. 80] and one Michael L. Chirby, with the aid of plaintiff, installed it on a Porter double spindle shaper [R. 109]. Plaintiff, who had no previous experience with this particular type of panel raiser head [R. 157] first operated the device for approximately one hour on October 27, 1950 [R. 141], and was operating it on the morning of October 28, 1950, when the injury to his hand occurred [R. 141]. The plaintiff was the only eyewitness as to what occurred.

Plaintiff testified that to the best of his recollection he owed between \$350.00 and \$400.00 for medical bills [R. 202]. He presented medical testimony of two doctors who had treated him [R. 209, 228], neither of which testified to the amount of his bill for services or as to the reasonableness of the amount claimed to be owed by plaintiff.

## Specification of Errors.

### I.

The trial court erred in denying the defendant's motion to dismiss the action or in lieu thereof, to quash the return of service of summons on the following grounds [R. 7]:

(1) That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Illinois and was not and is not subject to service of process within the Southern District of California.

(2) That the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of E. H. Preuer and Robert E. Dunne hereto annexed as Exhibits "A" and "B" respectively.

#### EXHIBIT A. AFFIDAVIT OF E. H. PREUER.

"State of California,  
County of Los Angeles—ss.

E. H. Preuer, being first duly sworn, deposes and says: That he is the sole owner of Woodworkers Supply Company, 1222 Santa Fe Avenue, Los Angeles, California; that on or about the 27th day of January, 1949, he was served with a copy of summons and complaint in the above-entitled action; that he is not an officer, a managing or general agent, or an agent authorized by appointment or law to receive service of process for and/or on behalf of Woodworkers Tool Works, a corporation, which is a corporation organized and existing under and by virtue of the laws of the State of Illinois.

/s/ E. H. PREUER.

Subscribed and sworn to before me this 25th day of Feb. 1949.

/s/ Illegible,  
*Notary Public in and for said County and State."*

EXHIBIT B. AFFIDAVIT OF ROBERT E. DUNNE.

"State of California,  
County of Los angeles-ss.

Robert E. Dunne, being first duly sworn, deposes and says: That he is one of the counsel for defendant, Woodworkers Tool Works, a corporation organized and existing under and by virute of the laws of the State of Illinois; that up to and including the date of this affidavit neither said defendant, nor any of its agents or employees, have been served with process in the above-entitled action; that said defendant was not at the time of the service of process upon E. H. Preuer, and is not now, doing business in the State of California so as to render it amenable to the service of process in this action.

/s/ ROBERT E. DUNNE.

Subscribed and sworn to before me this 25th day of Feb. 1949.

/s/ ELIZABETH P. WILLIAMS  
*Notary Public in and for said County and State."*

II.

The trial court erred in denying defendant's motion for a judgment of nonsuit on the following grounds [R. 219]:

(1) That there has been no evidence introduced that the defendant manufactured the item in question.

(2) There has been no evidence that the defendant sold the device to plaintiff's employer.

(3) There has been no evidence showing a causal connection between the breaking of the device and the injuries sustained by the plaintiff.

### III.

The trial court erred in charging the jury as follows: [R. 442-44, 463-64]:

“There is in our law a doctrine applying to negligence cases which is commonly known as the doctrine of *res ipsa loquitur*.’ Literally translated from the Latin, this means, ‘the thing speaks for itself.’

“That doctrine means that if a subject matter is shown by the evidence to have been manufactured and supplied for a particular use, and an injury to some person results from such usage, which would not have occurred in the ordinary course of things, if ordinary and proper care had been used in its manufacture, the thing or subject matter speaks for itself and the law raises the presumption that the manufacturer did not use ordinary and proper care in its production. The burden would then be on the manufacturer to substantially prove that ordinary and proper care was used in the manufacturing and supplying of such subject matter.

“However, the manufacturer is not responsible for defects that cannot be found by a reasonable, practicable inspection.”

To which instruction the defendant objected on the following grounds [R. 452]:

“Mr. Callaway: I want to object to giving of the instructions on the doctrine of *res ipsa loquitur* on the ground that the courts have not extended that doctrine to the case of the manufacturer, to my knowledge, except in the beverage cases. Even *Mac-*

*Pherson v. Buick* is not a *res ipsa loquitur* case. I think that is the leading case on which all these cases are bottomed."

#### IV.

The trial court erred in denying defendant's motion for a directed verdict on the following grounds[R. 425]:

"Mr. Callaway: Yes. At this time the defendant wishes to move the court to direct a verdict in favor of the defendant on the grounds that no negligence has been shown in connection with the manufacture of the device in question, and that there is no cause or connection between the defect, if any, of the device and the injuries received by the plaintiff."

#### V.

The trial court erred in denying defendant's motion for a judgment *non obstante veredicto*, or in the alternative for a new trial, on the following grounds [R. 56]:

(1) The verdict was contrary to law in that the special damages awarded to plaintiff were in excess of those pleaded or proven.

(2) The evidence was insufficient to justify the verdict of the jury in that there was no evidence of negligence on the part of this defendant.

(3) It was error for the Court to:

(a) Fail to grant this defendant's motion for a judgment of nonsuit at the close of plaintiff's case;

(b) Instruct the jury that the doctrine of *res ipsa loquitur* was applicable.

#### VI.

The trial court erred in permitting the foreman of the jury to impeach the verdict of the jury in granting appellee's motion to amend the verdict [R. 62-68].

### Summary of Argument.

The Champion panel raiser head, a woodworking tool used for the beveling of panels and the breaking of which instrument appellee contends injured his hand, was manufactured by the appellant Woodworkers Tool Works, Inc., an Illinois corporation. Appellant has no offices or salesmen in the state of California but publishes a catalogue of its products, a copy of which catalogue the Woodworkers Supply Company of Los Angeles, and independent wholesaler, owned by one E. H. Preuer, used. Selby Company, a manufacturer of sash and doors and the employer of appellee, ordered from the Woodworkers Supply Company of Los Angeles such a Champion panel raiser head. This wholesaler did not stock the product, therefore ordered it from the appellant in Chicago, which panel raiser head, for the purpose of expediency, was sent directly to Selby Company pursuant to the wholesaler's instructions. Appellant billed Woodworkers Supply Company and Woodworkers Supply Company in turn billed Selby Company. Selby Company received the panel raiser head via air express three days before the accident during which interval it was handled by several persons including one Michael Chirby who installed it.

The appellee purportedly injured his right hand while operating a woodworking machine known as a shaper upon which the Champion panel raiser head was mounted. At the time of appellee's injury it was discovered that the casting of the panel raiser head was broken and although appellee did not know what actually caused his injury (other than that he had heard a faint click in the



panel raiser head, let loose of the board he had been feeding into the machine and ducked under the table), he brought this action against the appellant for the negligent manufacture of the said panel raiser head.

Appellant, a foreign corporation with no officers or agents in California, was at no time or place ever served with process in this action. Instead, appellee made service upon E. H. Preuer as agent of the Woodworkers Supply Company. This fact was brought to the attention of the trial court on a motion to dismiss the action and quash the return of service. However, for some unknown reason the Court ignored this essential point and denied the motion.

Appellee testified at the trial that his medical expenses totaled between \$300.00 and \$400.00 and presented two doctors who treated him. However, no testimony was presented by either of the doctors as to medical expenses or the reasonableness thereof. At the close of the trial the jury returned a verdict in favor of appellee and fixed the special damages at \$8,000.00 and the general damages at \$1,000.00. Appellee moved the Court for an amended verdict on the basis of an affidavit of the jury foreman stating that the amounts awarded were \$1,000.00 for special damages and \$8,000.00 for general damages. The motion was granted and an amended judgment was entered accordingly.

On the above facts it is urged that: (1) The trial court had no jurisdiction over this action for the reasons that: (a) the appellant was never served with process; (b) the



appellant was not amenable to process within the state of California; and (c) that neither E. H. Preuer nor Woodworkers Supply Company were the authorized agents of appellant to receive service of process. (2) The evidence fails to disclose any negligence on the part of appellant or any causal connection between the breaking of the panel raiser head and the injury. (3) The doctrine of *res ipsa loquitur* is not applicable to the facts of this case. (4) No evidence having been presented by appellee as to the reasonableness of his medical expense the jury acted contrary to law in awarding appellee special damages. (5) To permit the foreman of the jury to impeach the verdict was prejudicial error of the Court.

## ARGUMENT.

### I.

Appellant Was Never Served With Summons in This Action nor Was Appellant Subject to Service of Process Within the Southern District of California. Therefore, the Trial Court Erred in Denying the Motion to Dismiss the Action and Quash the Return of Summons.

The question of jurisdiction must be decided first and where it clearly appears that jurisdiction is wanting the Court should so find and proceed no further. See *Fletcher v. Gerlach*, 7 F. R. D. 616.

#### 1. Appellant Was Never Served With Process in This Action.

The summons and complaint in this action was served on one Elmer Preuer as agent for Woodworkers Supply Company [R. 498]. No process has ever been served upon Woodworkers Tool Works, Inc., the appellant herein, nor any of its agents or employees [R. 11.] Nor has any person purportedly been served as agent of Woodworkers Tool Works, Inc.

Woodworkers Supply Company of Los Angeles, California, is a sole proprietorship owned by Elmer Preuer [R. 265] and is not a party to this action. Woodworkers Tool Works, Inc., the appellant herein, is an Illinois corporation, located in Chicago, Illinois [R. 272].

Though both business firms use the word "Woodworkers" in their title each is an entirely separate entity. There was no identity of interest or exercise of control of one over the other [R. 266-67, 274, 284].

E. H. Preuer is not employed by, nor does he have any ownership interest in Woodworkers Tool Works, Inc.

Likewise, Woodworkers Tool Works, Inc., has no connections with Woodworkers Supply Company [R. 274].

Therefore it is self-evident that appellant was never served with summons in this action. In consequence, the service of process upon E. H. Preuer should have been rejected as invalid and the action dismissed.

Service of summons and complaint upon a foreign corporation must be made by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process; or service must be made in the manner prescribed by a statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

Rule 4d (3) (7) of the Fed. Rules of Civil Proc.  
*Mas v. Owens-Illinois Glass Co.*, 34 Fed. Supp.  
415;

*Cannon v. Time, Inc. et al.*, 115 F. 2d 423;

*Hedrick v. Canadian Pacific Railway Co.*, 28 Fed.  
Supp. 257.

**2. Appellant Was Not and Is Not Subject to Service of Process Within the Southern District of California.**

Whether appellant Woodworkers Tool Works, Inc., was doing business within the state, and whether the person served was an authorized agent, are questions vital to the jurisdiction of the Court. A decision of the District Court on either question, if duly challenged, is subject to review in the Appellate Court; and the review

extends to findings of fact as well as to conclusions of law.

*Herndon-Carter Co. v. James N. Norris & Co.*,  
224 U. S. 496, 32 S. Ct. 550, 56 L. Ed. 857;

*Wetmore v. Rymer*, 169 U. S. 115, 18 S. Ct. 293,  
42 L. Ed. 682.

“A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state, the process will be valid only if served upon some authorized agent.”

*St. Louis Southwestern R. Co. v. Alexander*, 227  
U. S. 218, 226, 33 S. Ct. 245, 57 L. Ed. 486,  
488.

Appellant Woodworkers Tool Works, Inc., located at 222 South Jefferson Street, Chicago 6, Illinois, is an Illinois corporation [R. 272]. It has no place of business outside of Chicago, Illinois. It has no salesmen or agents in the state of California [R. 273]. There is no one in California who is authorized to represent appellant nor has Woodworkers Supply Company or E. H. Preuer ever at any time been authorized to act as agent of appellant [R. 274-5].

The trial court having completely ignored the fact that E. H. Preuer had been served as agent of Woodworkers Supply Company [R. 499] ruled on appellant's motion under the obvious misapprehension that E. H. Preuer had been served as agent of the appellant. Even if it be assumed, despite the foregoing facts, that service had been made upon Preuer as agent of appellant such at-

tempted service would have been made upon one not authorized to act as appellant's agent.

The deposition of William Victor Knourek, vice president in charge of production of Woodworkers Tool Works, Inc., taken in Chicago prior to the trial, was read into the record at the trial. His testimony was read by Mr. Callaway and the questions propounded to Mr. Knourek were read by Mr. Lopardo. We quote therefrom [R. 273-75]:

“Mr. Lopardo: Do you have any salesmen in the state of California?

Mr. Callaway: No sir, we do not.

Mr. Lopardo: And do you have any place of business in the state of California?

Mr. Callaway: We do not.

Mr. Lopardo: Do you have any agents in the state of California?

Mr. Callaway: We do not.

Mr. Lopardo: Is there anyone in California who is authorized to represent your company in a business way?

Mr. Callaway: There is not.

Mr. Lopardo: The Woodworkers Supply Company, do they have any connection with your company?

Mr. Callaway: They do not.

Mr. Lopardo: And have they at any time been authorized to act as your agent?

Mr. Callaway: No sir.

Mr. Lopardo: Now, Mr. E. H. Preuer of that company, is he employed by your company?

Mr. Callaway: No sir.

Mr. Lopardo: Then, the only dealings that you have had with the Woodworkers Supply Company is

that you have sold them some raiser heads; is that correct?

Mr. Callaway: Panel raiser heads, and other tools we manufacture.

Mr. Lopardo: Those sales, were they made here in Chicago, or elsewhere?

Mr. Callaway: The orders were mailed in to us from out of state.

Mr. Lopardo: And then you delivered the merchandise to whatever carrier they designated, is that correct?

Mr. Callaway: That is right.

Mr. Lopardo: The panel raiser head in question, that was delivered to air freight, is that correct?

Mr. Callaway: That is right.

Mr. Lopardo: And you received an order from Woodworkers Supply Company requesting you to sell them two panel raiser heads, is that correct?

Mr. Callaway: That's right.

Mr. Lopardo: And you delivered them pursuant to their directions to air freight for delivery?

Mr. Callaway: I believe we only shipped one air freight; the other one was regular express, if there were two.

Mr. Lopardo: And then you billed them for these two items, did you not?

Mr. Callaway: We did.

Mr. Lopardo: They were not acting as your agents or servants in making a sale?

Mr. Callaway: They were not.

Mr. Lopardo: And the transaction between you and the Woodworkers Supply Company was merely that of vendor and vendee, of seller and purchaser?

Mr. Callaway: That is right."

We quote from the testimony of Elmer H. Preuer [R. 265-67]:

“Q. Mr. Preuer, your business or occupation?

A. Machinery supply business.

Q. What firm or style do you do business under?

A. Operating under the name of Woodworkers Supply Company, individual ownership.

Q. Partnership or sole proprietor? A. Individual ownership.

Q. Who owns it? A. I do.

Q. How long have you been in business? A. Since 1928.

Q. 1928? A. Yes.

The Court: He is from the concern, or the local concern?

Mr. Callaway: Local concern.

The Court: All right. Go ahead.

Q. (By Mr. Callaway): What relationship do you have with the Woodworkers Tool Works in Chicago?

Mr. Olson: To which I object. It is incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: We buy and sell machinery and supplies, and in our course of business there are certain items that are manufactured by the Woodworkers Tool Works which we sell on a commission basis.

Q. (By Mr. Callaway): By that do you mean you pay them a certain price? A. They bill us and we, in turn, bill the customer.

Q. They bill you the wholesale price and you bill the customer the retail price? A. They would bill us, if an item were \$75.00 they would bill us \$75.00 less 10 per cent.

Q. Do they have any financial interest in the concern? A. Our company?

Q. Yes. A. None whatsoever.

Q. Have they ever had? A. No, sir.

Q. Do you represent any other people who made woodcutting or working machinery? A. A hundred accounts.

Q. Beg pardon? A. About a hundred accounts.

Q. A hundred manufacturers? A. That is right.

Q. Did your concern sell a panel raiser head to the Selby Company? A. Yes, sir.

Q. Did you bill the Selby Company for that? A. Yes, sir.

Q. Did, in turn, the Woodworkers Tool Works bill you for it? A. Yes, sir.

Q. Did they give you any instructions as to how you should operate your business or sell that product? A. No, sir.

Q. In other words, the relationship is solely buying from them at wholesale and selling at retail? A. That is correct.

Q. It is not unusual, is it, Mr. Preuer, where you place an order for some manufacturer, where you don't carry the item in stock, to have them ship direct to the buyer? A. That is often done.

Q. It was done in this case? A. Especially where the customer is in a hurry and requests it to come air express.

Mr. Callaway: That is all."



If the trial court's ruling that proper service was effected is to be upheld it would be just as ridiculous if a person were to go to a local department store and enter a subscription to a popular national magazine such as Time or Newsweek and then sue the magazine by serving the department store.

The affidavit of William R. Walker [R. 15] even if given full credence does not justify the lower Court's ruling. The mere possession of the catalogue of a manufacturer certainly is not sufficient to constitute one an agent for the purpose of the service of process, and certainly a representation by a salesman of an independent wholesaler that he represented the Woodworkers Tool Works, Inc. would be but a self-serving conclusion at best. The affidavit of Ray Taylor [R. 11, 12, 13] is certainly of no aid, based again on conclusions and hearsay, and even if taken at its full value would not have the effect of constituting Mr. Preuer as owner of the Woodworkers Supply Company, an agent of the appellant, for the purpose of effecting valid service of process upon appellant. Aside from these two affidavits there is nothing in the record which even tends to support appellee's contention that the jurisdiction of the District Court was properly invoked.

Upon the foregoing facts it is submitted that (1) appellant was never served with process in this action; (2) appellant is not doing business in California in any manner as to make it subject to service of process; (3) neither Preuer nor the Woodworkers Supply Company is or was an authorized agent of Woodworkers Tool Works, Inc.

II.

Appellee Failed to Produce Any Evidence of Negligence or of Causal Connection Upon Appellant's Part. Therefore, the Trial Court Erred in Denying the Motions for Nonsuit, Directed Verdict and Judgment Non Obstante Veredicto.

1. The Evidence Fails to Establish Any Negligence on the Part of the Appellant.

"In this state, negligence is not presumed from the mere fact of injury."

*Depons v. Ariss*, 182 Cal. 485, 488, 188 Pac. 797.

It is fundamental that, before recovery may be had by a plaintiff, it must be established that the defendant was negligent. The mere fact that an accident has occurred does not of itself result in any inference of negligence as against a defendant.

*Hubbert v. Astec Brewing Co.*, 26 Cal. App. 2d 664, 688, 80 P. 2d 185;

*Miller v. Cranston*, 41 Cal. App. 2d 470, 107 P. 2d 963.

The evidence is uncontradicted and appellant conclusively proved that it made between five and seven inspections of the Champion panel raiser head before it was shipped [R. 302, 337-358]. Not one scintilla of evidence was introduced by plaintiff to show or tend to show that the appellant had the duty to do anything more than the inspections thus made. That these inspections on the part of appellant constituted reasonable inspection of an ordinarily prudent manufacturer was in nowise contradicted by appellee. Though appellee did introduce evidence of various tests [R. 192, 194] none of them was shown to be a

feasible or reasonable test and, in fact, Mr. Cheney, the appellee's own expert, positively testified that the only reasonable tests or inspections in this type of case were visual inspection and X-ray [R. 194]. It was at this point that the Court informed the jury that the X-ray test was so expensive that it was not reasonable in the premises [R. 193].

While the appellant may have had a duty to make an inspection of the panel raiser head it is not responsible for defects that cannot be found by a reasonable, practicable inspection. (*Honea v. City Dairy, Inc.*, 22 Cal. 2d 614, 618, 140 P. 2d 369; *Sheward v. Virtue*, 20 Cal. 2d 410, 414, 126 P. 2d 345; *O'Rourke v. Day & Night Water Heater Co.*, 31 Cal. App. 2d 364, 369, 88 P. 2d 191; *Smith v. Peerless Glass Co.*, 259 N. Y. 292, 181 N. E. 576.) In the instant case there is no evidence that a feasible means of discovering the defect or flaw was available to this appellant. Here no negligence on the part of appellant was shown nor can any be implied from the circumstances of the accident.

We quote from the case of *Honea v. City Dairy, Inc.*, *supra*, excerpts peculiarly applicable to the facts of the instant case and which we deem determinative:

"In the Bruckel case the court said (102 N. Y. S. 398): 'There is no proof that inspection or examination of the bottle would have made its defect known to the most careful vendor or even to an expert in his employ. It does not appear that either one or the other could have ascertained the defect by any test short of those made by the expert witness of the plaintiff. If the fact were otherwise, it was the duty of the plaintiff to give evidence thereof; and in the absence of all evidence the jury cannot grope in speculation for a test or assume that there was one.'

“The limit of its duty was to provide against defects discernible upon reasonable inspection and to handle the bottles with reasonable care. *There is not anything to show it failed of duty in these respects. We cannot conjecture that it may have done so.* The mere happening of the accident did not establish negligence, and that only was shown. The proof offered by plaintiff clearly failed to support the burden imposed upon him. As was said by the learned court below: ‘Under the evidence the only reasonable inference that can be deduced is that the accident was due to a latent unsuspected defect. *McSorley v. Katz*, 53 Pa. Super. 243.’ ”

**2. The Evidence Fails to Establish Any Causal Connection Between the Breaking of the Panel Raiser Head and the Injury Sustained by Appellee.**

Appellee testified that he was running a panel through the raiser head when he heard a faint click [R. 142, 165]; that he then dropped below the table top and stopped the machine by putting his left foot on the emergency brake [R. 142, 151-2, 154]; that he stayed underneath the table until things stopped dropping and then he got up and looked around [R. 143]; he first looked at the machine and then he looked at himself and observed that his hand and little finger were cut [R. 143]; that one to one and a half minutes elapsed between the time he heard the faint click and observed his injury [R. 165].

Appellee was not conscious of any object striking him [R. 160] and, as a matter of fact he does not know what cut his hand [R. 171].

Thus, one must resort to conjecture or surmise to determine the cause of appellee's injury. This is borne out

by the following testimony of appellee, who was the only eyewitness to the incident in question. At page 142 of the transcript of record:

“Q. Now, what time, to the best of your knowledge, did this accident occur? A. About 8:35 in the morning.

Q. Did you have any warning that it was going to occur? A. I heard a faint click.

Q. While you were working with this wood you heard a faint click? A. Yes.

Q. What, if anything, did you do when you heard that click? A. I went below the table top.

Q. You dropped below the table top when you heard the click? A. Yes, sir.

Q. Calling your attention again to Plaintiff's Exhibit 3, the front page, you say that is the relative position you were standing in at the time of the accident? A. Yes, sir.

Q. In other words, when you dropped then you would be just where this man would be if he fell down? A. Yes, sir.

Q. Do you know, of your own personal knowledge, how fast that shaper was going at the time of the accident? A. It was supposed to be around 7200 r.p.m.'s, revolutions per minute.

Q. You can assume it was going 7200 revolutions per minute when the accident happened? A. Yes.

Q. As I get it now you heard a sharp click and you dropped to the ground? A. Yes.

Q. You dropped to the ground when that happened? A. Yes.

Q. Then what happened after the place had quieted down? A. I got up and looked around, to

see if anybody was around, or anything. That perhaps somebody would have been hit by whatever flew apart.

Q. Then what did you do? A. Then I started to look at the machine, to see what happened.

Q. Did you find you were injured yourself in any way? A. I took a quick look at the machine and then I figured I had better look at myself.

Q. Did you finally look at yourself? A. Yes.

Q. What did you observe when you looked at yourself? A. That my hand was cut across the palm, and my little finger was just barely on."

Then, at page 154:

"Q. Mr. Byrne, what struck this particular arm that was broken off? A. That I do not know.

Q. I take it, of course, that at the speed at which this top member was traveling that you couldn't determine whether the arm was broken before the slipping took place on the shaft or afterward? A. No, sir."

And, at page 160:

"Q. Now, you were not conscious of any object striking you, were you? A. No, sir.

Q. The first thing you knew was that after an elapse of two or three minutes you looked down and saw your hand was bleeding, isn't that true? A. Yes, sir."

And, at page 164:

"Q. (By Mr. Olson): Do you know what struck the arm?

The Court: I would like to find out from you yourself, Mr. Byrne.

The Witness: I do not know, your Honor.

The Court: You do not know?

The Witness: No.

Q. (By Mr. Olson): Do you know whether anything struck the arm? A. No, sir.

The Court: As a matter of fact, you were not conscious of the injury to your hand until you began raising yourself up?

The Witness: That is right.

The Court: For all you know, you may have cut your hand on something under the table?

The Witness: There was nothing under the table, your Honor, that could have cut me.

The Court: Was there any blood around? Did you observe whether there was any blood around the cutter that would indicate you were cut while you were operating on top of the table?

The Witness: No, there wasn't any blood or anything to indicate it before the machine broke.

The Court: When did you first see the blood, right after you got up, and was it on the floor?

The Witness: After I got up there was blood on the floor.

The Court: Was there a trickle of blood from the table on which you were operating the machine to the place where you stooped?

The Witness: In the excitement I couldn't tell you, your Honor.

The Court: I do not blame you. You were hurt pretty badly. We are just trying to find out what you do remember.

The Witness: As soon as I hit the floor, and I waited, when I got up, why—

The Court: Can you give us an idea of the lapse of time between the time you were hurt, when you heard the—what did you call it, a noise?

The Witness: A click, a sort of a click.

The Court: —you heard the click and the time you felt any sensation of injury to your hand or numbness? I asked you a question before and you said something about your hand feeling numb.

The Witness: Yes, it was. In other words, it was more or less paralyzed. I moved my left hand before the right.

The Court: Give me first the lapse of time, if you can tell.

The Witness: Approximately, maybe a minute, a minute and a half.

The Court: That feeling came to you as you were already stooped, or did it come before?

The Witness: The numbness?

The Court: Yes.

The Witness: I didn't notice it until I got up on my feet.

The Court: You were not aware of any sensation of pain or numbness before you had actually stooped under the table?



The Witness: No, sir. There was quite a bit of noise, and so forth.

The Court: I understand that.

The Witness: I may have felt it. In my opinion I don't believe I did.

The Court: You do not remember.

The Witness: No.

The Court: You do not remember the feeling?

The Witness: No.

The Court: So you are sure, however, that it was not simultaneous? There was a lapse of time between your hearing the click and your feeling any sensation of having numbness or hurting in your hand? That feeling was after you had already stooped down, is that correct?

The Witness: Yes, sir. When something that fast hits you, you don't—

The Court: On direct examination you said something about that fact that the reason you ducked, as it were, was sort of instinctive, that you were trying to avoid things flying in all directions? Is that what you said?

The Witness: Yes.

The Court: Do you remember anything actually flying in all directions before you stooped or was it that you just did it instinctively, unconsciously?

The Witness: I remember as my head got below the tabletop things flying across my head and coming down.

The Court: Before you ducked or stooped down you do not remember seeing anything?

The Witness: No, sir.

The Court: I will put it this way: Did anything else accompany this click that you heard, such as scattering of things?

The Witness: Not until after I was under the table.

The Court: Do you remember what portion of your hands were on the board?

The Witness: Yes, your Honor.

The Court: That is, when you heard the click?

The Witness: I was running the board through the shaper in this manner (indicating), and I heard the click and I just went down. This hand was the last to go down because it was the furthest away (indicating)."

Proof, such as the foregoing, which leaves it doubtful whether an injury was the result of one of several causes is insufficient. The question of causal connection should not be left to the guess, conjecture or surmise of the jury.

*San Joaquin Grocery Co. v. Trewitt*, 80 Cal. App. 371, 252 Pac. 332.

Applying this rule to the evidence reviewed it is readily apparent that such evidence presented no basis for the conclusion of the jury other than mere speculation.

*McKellar v. Pendergast*, 68 Cal. App. 2d 485, 489, 156 P. 2d 950.

III.

**The Trial Court's Charge to the Jury of the Doctrine of Res Ipsa Loquitur Was Prejudicially Erroneous.**

1. **On the Facts Presented in This Case the Plaintiff Was Not Entitled to an Instruction on the Doctrine of Res Ipsa Loquitur.**

The doctrine of *res ipsa loquitur* does not apply unless the basic requisites of exclusive control and probability of negligence are proved by plaintiff.

*Gerhart v. Southern Cal. Gas Co.*, 56 Cal. App. 2d 425, 431, 132 P. 2d 874;

*Laganzo v. San Joaquin L. & P. Corp.*, 32 Cal. App. 2d 678, 695, 90 P. 2d 825;

*Honea v. City Dairy, Inc.*, *supra*.

Appellant relinquished control of the Champion panel raiser head on October 23, 1948, in Chicago, Illinois, when it was shipped air express to the Selby Company in Burbank, California [R. 290]. On October 25, 1948, it was received by Selby Company [R. 80] and then handed to one Michael L. Chirby [R. 105], an employee of the General Panel Corporation, the latter being the landlord of Selby Company [R. 82]. Chirby removed the panel raiser head from its container and he and two or three other men inspected the device [R. 106]. Later, Chirby and the plaintiff installed the panel raiser head on a Porter shaper [R. 109, 111]. The device was in use on the day prior to the accident [R. 141] and was in use on the morning of the accident. Thus, five days had intervened between the time that the panel raiser head had left the control of the defendant and the injury. Anything that transpired during that interval was certainly beyond the exclusive control of defendant.

Under the facts shown in the instant case the conditions warranting application of the doctrine have not been satisfied.

2. The Courts Have Not Extended the Doctrine of *Res Ipsa Loquitur* to Manufacturers of Instrumentalities Such as the Panel Raiser Head Herein Involved Where the Instrumentality Has Passed Out of the Possession and Control of the Defendant and Is Exposed to Tampering and Adjustments by Others.

If this were not true it would defeat the true reason for the rule, namely, that the circumstances surrounding the causing of the accident were such that the injured party is not in a position to know what specific conduct was the cause, whereas the one in charge of the instrumentality may reasonably be expected to know, and be able to explain, the precise cause of the accident. The reasons are numerous as to why the doctrine should not be applicable to the case at bar. The undisputed testimony is that the instrumentality had been shipped by the appellant, received by appellee's employer, inspected by two or more of appellee's fellow employees, installed by them on the shaper, and used for a part of two separate days. How then can it be said that the appellant is in the better position to explain the cause of the accident? How then should the appellant be reasonably expected to know and be able to explain the "precise cause of the accident?" If such were the rule it would be tantamount to making the liability of the manufacturer absolute, regardless of what might have happened between the time that the instrumentality left its possession and the occurrence of the accident to cause the instrumentality to break or fail. It will be remembered that this was a new piece of mechanism in both

design and character in-so-far as the appellee and his fellow employees were concerned. Appellant would not be in a position to know whether it was properly installed or properly used. The physical evidence would tend to indicate that the proper space between the two blades had been distorted after the accident. This could have been caused by a blow against one of the blades while in rapid revolution, it could be caused by the wood that was being cut not being held in proper position, or numerous other ways which the appellant is in no position to explain and by no strength of the imagination liable for.

It is peculiar to this brief-writer that if the appellee's hand was cut by a piece of the mechanism flying off, it would not have resulted in considerable bruising around the cut area. Whereas Dr. Detwiler testified that the wound had a macerated appearance, which he explains means "chewed up" [R. 236], that it could have been caused by a piece of wood striking the hand [R. 241], which could, of course (coupled with the fact that the plaintiff did not know he was injured for a minute or two), indicate that he actually brought his hands too close to the cutting edges, which caused him to turn loose of the piece of wood he was cutting, thereby breaking one of the arms and blades off of the machine. The X-rays show a very clearly defined fracture line [R. 244], and that the injury could have been easily caused by coming in contact with the raiser head when in motion [R. 245]. It has been said aptly that this special doctrine applies only under special circumstances, namely, (1) the instrumentality by which the injury to plaintiff was approximately caused was in the possession and under the *exclusive control* of the defendant at the time the cause of injury was set in motion, it appearing on the face of the event that injury was caused

by some act or omission incident to defendant's management; (2) that the accident was one of such a nature as does not happen in the ordinary course of things, if those who have *control* of the instrumentality used ordinary care; (3) the fact that the circumstances surrounding the causing of the accident were such that the plaintiff is not in a position to know what specific conduct was the cause, whereas the one in charge of the instrumentality may reasonably be expected to know, and be able to explain, the precise cause of the accident.

It is only when all these conditions are found to have existed the inference of negligence to which they give birth will support a verdict for the plaintiff in absence of a showing by the defendant that offsets the inference. The foregoing is taken almost verbatim from the California Jury Instructions 206C published by West Publishing Company and compiled by a committee appointed to the task by the presiding judge of the Superior Court, of the Los Angeles Bar Association, and the Lawyers' Bar of Los Angeles County, consisting of eminent trial jurists and eminent practitioners at this bar. That the facts in this case fail to meet any of the prerequisites of the doctrine seems readily apparent. To further extend the application of the doctrine seems unjustifiable and placing a burden upon one party to a damage case without any sensible reason behind it.

It is submitted that the decision of *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P. 2d 436, drastically extended the prevailing rule in California as to the appli-

cation of the doctrine of *res ipsa loquitur*. In that case the plaintiff suffered injuries when a bottle of Coca Cola exploded and the court held that the doctrine was applicable. However, it cannot be too strongly urged that the decision was intended to apply only in cases involving containers of carbonated beverages. As stated on page 457 of the *Escola* case, "Many jurisdictions have applied the doctrine in cases involving exploding bottles of carbonated beverages."

#### IV.

**The Verdict of the Jury Was Contrary to Law in That the Special Damages Awarded to Plaintiff Were Neither Pleaded or Proven.**

1. The Jury Completely Disregarded the Law Relating to Special Damages as Given to Them by the Court.

"Special damages are those that are the natural, but not the necessary, result of the act complained, and not being implied by law, *they must be particularly pleaded and proven.*" *Morris v. Allen*, 17 Cal. App. 684, 688; 121 Pac. 690; *Moore v. Fredericks*, 24 Cal. App. 536; 141 Pac. 1049; *Skaggs v. Wiley*, 108 Cal. App. 429, 434; 292 Pac. 132.

Plaintiff's complaint prayed for "medical expenses when the total has been ascertained" [R. 26]. At no time did plaintiff amend his complaint to insert therein any particular amount of medical expenses claimed by him [R. 151].

At the close of the trial the court instructed the jury that special damages is the subject of direct proof and is



to be determined by the jury on the evidence before them [R. 447]. The court further instructed the jury that such damages must be of a reasonable value [R. 448].

A review of the reporter's transcript reveals that the record is absolutely devoid of any testimony or other proof relative to the reasonable value of medical services. Plaintiff put two of the three doctors who had treated him on the stand and neither doctor gave one iota of testimony as to his fees nor as to the reasonableness of any fees for medical services rendered. Nowhere in the testimony of Dr. Howard F. Detwiler [R. 228-246] nor of Dr. Ross Sutherland [R. 209-217] is there any evidence of the cost of their services for the care and treatment of plaintiff.

It is well established law in California that in proving special damages based upon medical services required, the proper measure of damages is the reasonable value of such services. Even the mere introduction of medical bills, without proof of the reasonableness of the charge for the services rendered or that said bills have been paid, is not sufficient evidence to support a finding of special damage.

*Latky v. Wolfe*, 85 Cal. App. 332, 259 Pac. 470.

It is therefore submitted that in a complete and utter disregard of the instructions of the court and despite the obvious fact that there was presented not one iota of proof as to the reasonableness of the medical services the jury arbitrarily returned a verdict for special damages.



V.

**It Was Grave Prejudicial Error for the Trial Court to Permit the Foreman of the Jury to Impeach the Verdict of the Jury.**

In support of the plaintiff's motion to amend the verdict he attached thereto the affidavit of George F. Caldwell, Foreman of the Jury, which in substance stated that an error was made in filling in the amount awarded as special damages and the amount awarded as general damages [R. 63-4].

The general principle is well stated at page 607 in *De Garmo v. Luther T. Mayor, Inc.*, 4 Cal. App. 2d 604, 41 P. 2d 366:

“Upon well grounded considerations of public policy jurors are legally disabled to impeach their verdict by any means, whether it be by affidavit or by testimony or by extra-judicial statements.” See:

*People v. Reid*, 195 Cal. 249, 261, 232 Pac. 457;

*Walter v. Ayvasian*, 134 Cal. App. 360, 25 P. 2d 526.

Similarly, in Federal Courts, the jurors may not impeach their own verdict.

*McDonald v. Pless*, 238 U. S. 264, 59 L. Ed. 1300, 35 S. Ct. 783.

On February 21, 1950, the jury rendered the following verdict [R. 52]:

“We, the Jury in the above-entitled cause, find in favor of the plaintiff, William J. Byrne, and against

the defendant, Woodworkers Tool Works, a corporation; and fix plaintiff's special damages at Eight Thousand Dollars, and fix plaintiff's general damages at One Thousand Dollars."

On order of the court, the jury was polled and each member thereof stated that the *verdict as presented and read* was his verdict [R. 53]. (Italics ours.)

Despite the fact that each of the eleven other jurors, as well as the foreman, personally stated to the court that the verdict was correct as presented and read, the one lone affidavit of the foreman, which had been signed and sworn to on March 9, 1950, *sixteen days after the verdict was rendered*, was permitted to impeach the verdict of the twelve jurors. (Italics ours.)

### Conclusion.

The foregoing discussion of the matters preceding the trial and of the evidence adduced at the trial shows:

1. That defendant was never served with process in this action and consequently the court had no jurisdiction of defendant.
2. That plaintiff presented no proof of negligence on the part of defendant nor did he establish any causal connection between the breaking of the device and the injury sustained by plaintiff.
3. That the doctrine of *res ipsa loquitur* was not applicable in this case.

4. That the jury acted contrary to law in awarding special damages.

5. That the foreman of the jury acted contrary to law in impeaching the verdict of the jury.

It is, therefore, urged that the trial court erred in denying defendant's (1) motion to dismiss, (2) motion for non-suit, (3) motion for directed verdict and (4) motion for judgment *non obstante veredicto*.

For the reasons stated herein it is respectfully submitted that the judgment must be reversed.

TRIPP & CALLAWAY,

By HULEN CALLAWAY,

*Attorneys for Appellant.*



No. 12548

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

WOODWORKERS TOOL WORKS, INC., a corporation,  
*Appellant,*

*vs.*

WILLIAM J. BYRNE,  
*Appellee.*

---

## APPELLEE'S BRIEF.

---

JOHN W. OLSON,  
639 South Spring Street, Los Angeles 14,  
*Attorney for Appellee*

**FILED**

**OCT - 2 1950**

**PAUL P. O'BRIEN,**

**CLERK**



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No. 9134-Y

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

WOODWORKERS TOOL WORKS, INC., a corporation,

*Appellant,*

*vs.*

WILLIAM J. BYRNE,

*Appellee.*

---

## APPELLEE'S BRIEF.

---

### Statement of Jurisdiction.

1. The statutory provisions to sustain the jurisdiction of the District Court and of the Court of Appeals are set forth in Appellant's Opening Brief (pp. 1 and 2, pars. 1 and 3).
2. The existence of jurisdiction is shown by the allegations of the second amended complaint in paragraph three thereof, as set forth in Appellant's Opening Brief (pp. 1 and 2, par. 2) [R. 22].

### Statement of Facts.

This is an appeal from the judgment entered pursuant to the verdict of the jury in favor of plaintiff and respondent William J. Byrne, and against the defendant and appellant, Woodworkers Tool Works, Inc., an Illinois corporation.

The defendant Woodworkers Tool Works, Inc., a corporation, moved for an order dismissing the action pursuant to Rule 12(b) (2-4-5) of the Federal Rules of Civil Procedure on the ground that the court lacked jurisdiction over the person of the defendant and for insufficiency of process and of the service thereof [R. 6-11]. This motion, after full hearing and after consideration of affidavits and authorities presented by both defendant and plaintiff, was denied by the trial court [R. 6-21]. Thereafter (pursuant to stipulation between counsel for plaintiff, William J. Byrne, and defendant Woodworkers Tool Works, Inc., a corporation) a second amended complaint was filed, a copy of which was duly delivered to counsel for defendant.

Defendant then moved for an order to dismiss the first count or cause of action of the second amended complaint [R. 32-34]. Said motion was granted [R. 34-36]. Defendant then filed its answer and went to trial of the case on the second cause of action. At the close of plaintiff's case defendant moved for a non-suit which motion was denied.

At the close of the trial and after all evidence had been presented by plaintiff and defendant, the defendant moved the court for a directed verdict which the court denied after the jury had brought in a verdict for plaintiff [R. 425-429]. Defendants then moved for a judgment *non obstante veredicto* or in the alternative of a new trial, which, after full hearing, was denied.

Plaintiff's motion to correct the verdict was granted and a corrected judgment was filed [R. 62-68].

The second cause of action of the second amended complaint for personal injuries alleged that plaintiff is a citi-

zen of the State of California and that defendant is and was at all times mentioned a corporation, duly organized and existing by virtue of the laws of the state of Illinois, engaged in manufacturing machine tools and in the business of selling machine tools in the State of California; that the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand (\$3000.00) dollars; that at all times mentioned plaintiff was regularly employed by E. George Selby, doing business as Selby Company; that the new Champion panel raiserhead was designed, manufactured and sold by said defendant. That plaintiff was injured when the said panel head, revolving at hundreds of revolutions per minute suddenly broke from structural defects, a piece of which struck plaintiff, directly and proximately causing the injuries and damages to plaintiff described; that plaintiff was strong, active and healthy in body and mind before his injury; that at the time of said injury plaintiff was thirty-three years old, that he was earning and capable of earning from two hundred and sixty dollars (\$260.00) to two hundred and seventy-five dollars (\$275.00) per month; that due to said injury, plaintiff has been ill and totally disabled from pursuing his usual occupation as a mill worker, or perform any work depending upon full use of his right hand; that ever since the said accident, plaintiff has been under the care of physicians for said injuries and has incurred medical expenses in the sum of two hundred and fifty (\$250.00) dollars to the date of the filing of his complaint [R. 22-26].

The answer of the defendant admitted it was engaged in the manufacturing of machine tools; that it sells Champion panel raiser heads, and that it partially manufactured said article (the panel raiser head here in question) [R. 27-31].

The plaintiff, including his own testimony, produced seven witnesses in his behalf. In substance, their testimony revealed the following facts:

That plaintiff was employed by Selby Company in the month of October, 1948, to operate a "Shaper" [R. 78]. That he was earning a salary of \$1.60½ per hour, eight hours per day, five days per week [R. 79]. That the Selby Company purchased a new Champion panel raiser head from the defendant company which was delivered to the Selby Company on October 25, 1948 [R. 80]; that the panel head was delivered in a sealed container [R. 105]; that the panel head was installed by an employee of the Selby Company on or about October 25, 1948 [R. 111]; that the employee who installed the panel head was experienced in that duty [R. 100-101]; that the plaintiff was present when the panel head was installed but did not participate in its installation [R. 126]; that the operation of the panel head was tested and given an operation test after it was installed and was found to have been properly installed [R. 114-115]; that the plaintiff was working with soft pine at the time of his injury [R. 86-87-128]; that on October 28, 1949, plaintiff was operating the panel raiser head on a "shaper" when he heard a sharp "click" and dropped immediately below the level of the machine upon which he was working, his right hand being the last portion of his body to drop below the table; that after "things had stopped dropping" plaintiff observed that his hand was cut across the palm and that his little finger "was just barely on" [R. 142-143]. That plaintiff's employer, George Selby, Michael L. Chirby (who installed the panel head) and the shop superintendent, Cornelius Leewenkamp, all observed the panel head, after the injury to plaintiff, and saw a large blowhole in the broken portion of the head

[R. 101-116-7, 132-3]. That the panel head was examined and analyzed by a chemist and engineer, Gough L. Cheney, after it had disintegrated. Mr. Cheney testified [R. 172-173] that the panel head contained structural defects which are visible to the naked eye on the surface of the panel head [R. 178-188]. That there was no evidence of abnormal operation or improper installation of the panel head prior to its breaking [R. 185]. That there was a blowhole at the point where the panel head broke about one-half inch deep [R. 188]; that other blowholes and excessive porosity may be seen in the vicinity of the broken arm [R. 189]; that the porosity and blowholes constitute seventeen per cent of the area of the point of fracture [R. 190]. That there was no evidence that the panel head had struck anything before breaking [R. 179-183-196]. That the excessive porosity of the panel head was even more evident while the panel head was in an unpainted condition during its manufacture [R. 188-189]; that blowholes weaken the strength of steel [R. 191].

Plaintiff was treated by two doctors [R. 228-237] and was examined by a Doctor Ross Sutherland [R. 210]. Doctors Ross Sutherland and Howard F. Detwiler testified that plaintiff's injury was of such a nature that he would be permanently disabled [R. 212, 238]. That plaintiff suffered a "forceful injury" and that his right hand was "chewed up" [R. 236]. That his right hand was in a plaster cast for one month [R. 235, 240]. That plaintiff visited Doctor Detwiler for treatment twenty-five times [R. 237] and Doctor Boyes for further treatment [R. 237]. That plaintiff should undergo reparative surgery [R. 212, 238]. That an operation as recommended would cost \$300.00 to \$500.00 and would require hospitalization



for a week or more, followed by total disability for approximately eight to ten weeks [R. 215].

Plaintiff testified that he owed approximately \$350.00 to \$400.00 in doctor bills [R. 202] and that he lost approximately eight months of work with an average weekly earning of \$64.00 per week [R. 202].

Defendants Woodworkers Tool Works produced four witnesses in its behalf: Jerome B. Townsend, Salesman for the Woodworkers Supply Company; Elmer H. Preuer, owner of the Woodworkers Supply Company; William Victor Knourek, Vice President in charge of production of defendant Woodworkers Tool Works, and Charles E. Meissner, plant superintendent of defendant company, Woodworkers Tool Works. The testimony of the latter two witnesses was taken by deposition in Chicago, Illinois, and read into the record during the trial.

The testimony of these witnesses, in so far as it touches upon the merits of this appeal, will later be referred to at the appropriate time.

The jury returned its verdict in favor of plaintiff and against defendant. The verdict set plaintiff's special damages at \$8000.00 and plaintiff's general damages at \$1000.00 [R. 54]. On motion by plaintiff, supported by authorities and by the affidavit of George F. Caldwell, foreman of the jury, to the effect that he had inadvertently made a clerical error in filling out the verdict [R. 64] the trial court ordered a corrected and amended verdict to be filed fixing plaintiff's special damages at \$1000.00 and general damages at \$8000.00 [R. 67].



*The Appellants Contend:*

1. That appellant was never served with summons in this action, nor was appellant subject to service of process within the Southern District of California.
2. That appellee failed to produce any evidence of negligence or of causal connection upon appellant's part.
3. That the trial court's charge to the jury of the doctrine of *Res Ipsa Loquitur* was prejudicially erroneous.
4. That the verdict of the jury was contrary to law in that the special damages awarded to plaintiff were neither pleaded nor proven.
5. That it was prejudicial error for the trial court to permit the foreman of the jury to *impeach* the verdict of the jury. (Italics ours.)

### Summary of Argument.

The Champion Panel Raiser Head was manufactured by the appellant, Woodworkers Tool Works, Inc., an Illinois Corporation. It was sold to appellee's employer, Selby Company in Los Angeles, California, by appellant's agent, Woodworkers Supply Company and was delivered to the Selby Company directly from the appellant Company on October 25, 1948. The Woodworkers Supply Company sold the item to the Selby Company through the use of a catalogue issued to it by the appellant Company which catalogue bore the name of the appellant Company upon its cover. The Woodworkers Supply Company billed the Selby Company for the part. The appellants sales office was the Woodworkers Supply Company of which Elmer H. Preuer is the owner. Said Elmer H. Preuer was served with summons and complaint in this action as agent of appellant Company and, within the statutory period thereafter, the appellant Company appeared in the action.

The appellee, while working with the panel raiser head the day after it was installed, received serious injury to his right hand as a result of the panel head disintegrating, a piece of which struck appellee's hand. The panel head was properly installed upon the device which turned it for the purpose of beveling and cutting wood in making panels for doors. After appellee's injury an examination of the panel raiser head disclosed that it was defective in that it contained numerous blowholes, particularly at the point where it broke, that portion being extremely porous and

obviously unfit for the purpose for which the panel head was properly to be used. That the defective construction of the panel raiser head was the sole cause of its breaking and directly resulted in injuring the plaintiff.

The testimony at the trial disclosed that appellee had incurred approximately \$350.00 to \$400.00 in medical bills; that appellee, because of his injury lost approximately eight and one-half months employment amounting to \$2176.00 based upon his earnings before his injury. That appellee was treated by three doctors, two of whom testified that appellee was permanently disabled.

The trial court, under the evidence as presented by appellee, was legally justified and was correct in denying appellant's motion to dismiss the action or in lieu thereof, to quash the return of service of summons, motion for a judgment of nonsuit, motion for a directed verdict, and motion for a judgment *non obstante veredicto*.

The trial court's instruction upon the doctrine of *res ipsa loquitur* was supported by the evidence and it would have been error for the court to have refused to give such an instruction to the jury under the facts as presented here. Finally, in granting appellee's motion to amend the verdict, the court merely corrected a clerical error in the filling out of the verdict by the foreman and, in doing so, the court did not err.

## CONTENTION OF APPELLEE AND ARGUMENT.

### I.

**Appellant Was Served With Summons and Is Subject to Service of Process Within the Southern District of California.**

“Service of summons and complaint upon a foreign corporation must be made by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment *or by law* to receive service of process. . . .” (Rule 4d(3)(7) of the *Federal Rules of Civil Procedure*.) (Italics ours.)

Appellant admits that the summons and complaint in this action was served on Elmer Preuer. However, appellant contends that Elmer Preuer was not an agent of appellant Woodworkers Tool Works, Inc., nor was he served as their agent. (App. Op. Br. p. 14.)

In support of that contention, appellant filed two affidavits; that of E. H. Preuer [R. 9-10] and Robert W. Dunne [R. 10-11; App. Op. Br. pp. 7 and 8]. Neither affidavit sets forth any material facts to support this contention and are but legal conclusions of the affiants. In the words of the trial judge, they were “merely negative” [R. 501].

Appellee, in opposition to appellant’s motion to quash the return of service of summons, filed the affidavits of William R. Walker and of Ray Taylor [R. 11, 15] which affidavits were referred to by the trial court as “positive”

[R. 501]. The affidavits of William R. Walker and Ray Taylor read as follows:

“State of California, County of Los Angeles—ss.

William R. Walker, being first duly sworn, deposes and says:

That during the month of October, 1948, and some time prior thereto, he was employed by the Selby Company and worked at said Selby Company in the capacity of manager;

That on or about October 23, 1948, affiant, in his capacity as manager of said Selby Company, determined that the said company was in urgent need of a Champion Panel Head, 1¼ bore, right hand, and that thereupon affiant telephoned the Woodworkers Supply Company and requested that they send a salesman to see him;

That thereafter a salesman from the Woodworkers Supply Company, whose name is Jack Townsend, visited affiant at the Selby Company's place of business, and brought with him a catalog upon which appeared the words 'Woodworkers Tool Works' and affiant ordered a panel head from said catalog and at said time was informed by said salesman, Jack Townsend, that the Champion panel head ordered was manufactured by the Woodworkers Tool Works, an Illinois corporation, and that he, as salesman for Woodworkers Supply Company, represented the Woodworkers Tool Works. At said time and place, affiant or his employer, Jim Selby, signed a purchase order to the Woodworkers Supply Company, and the Woodworkers Supply Company, thereupon ordered said panel head from the Woodworkers Tool Works, which was shipped direct to the Selby Company from the Woodworkers Tool Works by air express on October 23,

1948. That said Selby Company was billed by the Woodworkers Supply Company in the total amount of \$83.61, said sum representing the purchase price of \$75.00, \$1.88 tax, and \$6.73 representing two telephone calls to Woodworkers Tool Works from Woodworkers Supply Company.

That to affiant's own personal knowledge said Selby Company, through affiant, has ordered other products from Woodworkers Tool Works through the Woodworkers Supply Company.

WILLIAM R. WALKER.

Subscribed and sworn to before me this 15 day of March, 1949.

(Seal)

RUTH D. FISHER,

Notary Public in and for said County and State."

"State of California, County of Los Angeles—ss.

Ray Taylor being first duly sworn deposes and says that he is employed by Pacific Employers Insurance Company of Los Angeles, California in the capacity of investigator. During the course of his employment, he had reason to investigate the circumstances surrounding the sale to the Selby Company by Woodworkers Tool Works of a Champion Panel Head 1¼ bore, right hand. That affiant visited the Selby Company, purchasers of the said panel head and also visited the Woodworkers Supply Company of Los Angeles, and there interviewed the employees of the supply company, and Mr. E. H. Preuer, owner of the Woodworkers Supply Company; that affiant was informed and his investigation revealed that the Selby Company, through their manager, William R. Walker, called the Woodworkers Supply Company

and asked that they send a representative to the Selby plant. That a representative by the name of Jack Townsend visited the Selby Company in response to the said request of William R. Walker, and there showed Mr. William R. Walker a catalog of the Wood Workers Tool Works, an Illinois corporation, and that Mr. Walker ordered the said panel head from the said catalog through Mr. Townsend. That a purchase order was signed by the Selby Company to the Woodworkers Supply Company, and an invoice was prepared by the Woodworkers Supply Company for the purchase of said panel head. That the said panel head was delivered air express by the Woodworkers Tool Works directly and that the Woodworkers Supply Company billed the Selby Company for said panel head directly. Said Invoice was sent to the Selby Company by the Woodworkers Supply Company, a copy of which is attached hereto and made a part of this affidavit. Affiant was informed by Mr. Preuer that Woodworkers Supply Company keeps in its place of business a catalogue of Woodworkers Tool Works and affiant saw the said catalogue; that on the face of the said catalogue are the words 'Woodworkers Tool Works' and their Chicago address; that affiant's investigation revealed that Woodworkers Supply Company represented Woodworkers Tool Works throughout this complete sales transaction, and that at no time did Selby Company directly contact Woodworkers Tool Works about the same; that all contacts were exclusively through the Woodworkers Supply Company.

RAY F. TAYLOR.

Subscribed and sworn to before me this 15 day of March, 1949.

RUTH D. FISHER,  
Notary Public in and for said County and State."



After the trial court had denied the motion of appellant to dismiss this action, or, in lieu thereof, to quash the return of the service of summons [R. 21] appellant during the trial of this action, again attempted to establish that the party served with process was not an agent of the defendant corporation and that the defendant was not "doing business" in the State of California so as to be amenable to suit in the Southern District of California. The trial court admitted this evidence, though for another purpose [R. 276], and at one time commented that "there was no issue of jurisdiction here" [R. 250].

Following is a summary of that testimony:

Appellant's witness, Jerome B. Townsend testified that he was a salesman for the Woodworkers Supply Company [R. 249]. That he called upon the place of business of appellee's employer with a catalogue of the appellant, Woodworkers Tool Works, Inc., which catalogue bore on its cover the words "Woodworkers Tool Works Series K-1945" [R. 260-261]. The witness showed appellee's employer that catalogue and no other and further testified that he has sold others of these devices of the appellant company in California [R. 257-258].

It was testified by E. H. Preuer, president of the Woodworkers Supply Company that there are certain items of appellant company which are sold by him [R. 265]. *That he has a running course of business with the appellant company every year and sells some of its products at all times* [R. 267]. That he issues no catalogue of his own but constantly maintains a catalogue of appellant's company in his place of business and which is used by his



salesmen [R. 267-268] and, finally, that his company does the billing for the products it sells for the appellant [R. 266].

William Victor Knourek, vice-president in charge of production of the defendant company, Woodworkers Tool Works, Inc., testified that the panel heads manufactured by the defendant company are sold by that company throughout the United States and California [R. 294]; that these items are advertised in the defendant company's catalogue and in all the national woodworking magazines [R. 295] and that the defendant company issues and distributes their own catalogue bearing the name of the defendant on its cover [R. 295] and that the order for the particular panel head here in question was taken by Woodworkers Supply Company which, in turn, directed the defendant company to ship the item directly to plaintiff's employer [R. 295].

It is to be noted that the appellant was not registered in the State and, had not, at the time of the filing of this action, appointed an agent upon whom service could be made [R. 17].

The question then is:

(A) Was Elmer Preuer, of the Woodworkers Supply Company, an agent of the appellant company authorized by appointment or by law to receive service of summons within the meaning of the Federal Rules of Civil Procedure (*supra*)?

(B) Was the appellant corporation "doing business" in California so as to be subject to service of process within the Southern District of California?

A.

It is stated in the case of *Operative Plasterers & Cement Finishers International Association of the U. S. & Canada v. Case*, 93 F. 2d 56:

“The rationale of all rules for service of process on Corporations is that service must be made on a representative so integrated with the corporation sued as to make it *a priori* supposable that he will realize his responsibilities and know what he should do with any legal papers served upon him.”

Again in *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569, the court states:

“The question turns upon the character of the agent, whether he is such that the law will imply the power and impute the authority in him; and, if he be that kind of an agent, the implication will be made (of authority) notwithstanding a denial of authority on the part of the other officers of the corporation!”

California is in accord with the above principles. For example it is stated by the court in *Roehl v. Texas*, 107 Cal. App. 691 at page 704 (291 Pac. 255):

“We hold the true rule to be \* \* \* that every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made.”

In *Milbank v. Standard Motors Construction Co.*, 22 Pac. 2d 271, 132 Cal. App. 67, it is stated (at p. 71):

“The true rule is found in the case of *Connecticut Mutual Life Insurance Company v. Sprately* (*supra*), which reads as follows:

“ ‘In such case it is not material that the officers of the company deny that the agent was expressly given such power (to accept service of process), or assert that it was withheld from him. The question turns upon the Character of the agent, whether he is such that the law will imply the power and impute the authority to him, and, if he be that kind of an agent, the implication will be made notwithstanding a denial of authority on the part of the other officers of the corporation.’ ”

In *Fort Wayne Corrugated Paper Company v. Anchor Hocking Glass Corp.*, 31 Fed. Supp. 403, we find the following comment:

“A service of summons and complaint on a sales representative of a foreign corporation which was not registered in the state and which had not appointed an agent upon whom service could be made but which sold its products within the state through representatives who were paid on a commission basis and who maintained offices which were identified by the name of the corporation was a valid service upon that corporation.”

Here the appellant was not registered in the State of California [R. 17] and the name of the appellant company and of the agent served are almost identical.

In the light of the evidence and the affidavits filed on behalf of the plaintiff, can it be said that, in the instant case, Elmer Preuer, President of the Woodworkers Supply

Company, was not such a representative of the appellant, and that the authority and responsibility of the person served was of sufficient character and rank that service of process upon him constituted service upon appellant; and that this responsibility and character was recognized by the person served and by appellant in responding thereto, answering and going to trial on the merits of plaintiff's case?

B.

The case of *International Harvester Company v. Kentucky*, 234 U. S. 579, is a leading case on the subject of what constitutes "doing business" for the purpose of service of process. In that case the foreign corporation had no headquarters or place of business in the state, there was merely a solicitation of orders and those who obtained the orders did nothing more than that, the orders obtained were subject to the approval of a general agent outside the state where the order was made; the agents made collections for the sale though they had no authority to compromise claims or to contract for the foreign corporation; and, finally, all deliveries were made directly from outside the state. The United States Supreme Court nevertheless held that the foreign corporation was "doing business" in Kentucky so as to subject itself to the jurisdiction of that state for the service of process:

The court said:

"\* \* \* Here was a continuous course of business in the solicitation of orders which were sent to another state and in response to which the machines of the Harvester Company were delivered within the State of Kentucky. This was a course of business, not a single transaction. \* \* \* The agents not

only solicited such orders in Kentucky, but might there receive payment in money, checks or drafts  
\* \* \* In the case now under consideration there was something more than mere solicitation. In response to the orders received, there was a continuous course of shipment of machines into Kentucky.” (P. 587.)

The *International Harvester Company* case has been followed in this and other states. In *Moore Machinery Co. v. Stewart-Warner Corporation*, 27 Fed. Supp. 526 at page 530 (Cal.), the Court, in concluding that the defendant there involved was doing business in California sufficient to sustain service of process, cited *International Harvester Co. (supra)*, *Tauza v. Susquehanna Coal Co.*, 115 N. E. (N. Y.) 915, and *American Asphalt Roof Corporation v. Shankland*, 219 N. W. (Iowa) 28, and concluded with the statement that “California decisions are in line with the holdings of the cases just cited.”

See *Milbank v. Standard Motor Construction Co.*, 132 Cal. App. 67, 70, 22 P. 2d 271.

See also:

*West Publishing Co. v. Superior Court of State of Calif.*, 20 Cal. 2d 720, 128 Pac. 777; and

*The Thew Shovel Co. v. Superior Court*, 35 Cal. 2d 183, 95 P. 2d 149.

In the *Moore Machinery Co.* case (*supra*), the court made the following comment:

“The persistent effort of foreign Corporation to evade service of jurisdictional processes in the states has led some of the courts to suggest the application of a practical test, that where the defendant corporation’s local activities justify it, the defendant be

drawn from its home state as in this case, upon the grounds of fairness: instead of sending plaintiff to Virginia or Illinois to try its case, bring defendant here.”

In *Davis v. Motive Parts Corp.*, 16 F. 2d 148, the court states:

“I think that when a foreign corporation not only accepts orders, but fills the same and receives the pay therefore through the instrumentality of an agent located within this state it should for all reasonable and practicable purposes be said to have come here. To the extent of such activities it is doing all that it could do if it had here opened an office under its own name. The facts disclosed are sufficient to bring the case within the authority of *International Harvester*.”

In accord:

*Milbank v. Standard Motor Construction Co.*  
(*supra*).

Very little more than solicitation of business has been held to be sufficient to constitute “doing business.” It has even been suggested that solicitation alone should be enough of an activity to constitute doing business.

In the case of *Frene v. Louisville Cement Co.*, 134 F. 2d 511, annotated in 146 A. L. R. 926, the court said in this connection:

“But when jurisdiction has been extended to include some types of occasional acts and nearly all kinds of continuous operations, the rule which nullifies judicial power when a foreign corporation engages continuously and regularly in ‘mere solicitation’ is, to say the least, anomalous. Solicitation plus main-

taining an office is sufficient, solicitation plus maintaining a warehouse likewise sustains jurisdiction. Solicitation plus making deliveries, collections and handling claims, has like effect. Solicitation without these additional activities, or any of them, may be more sustained, more insistent, more productive of business than it is with them, solicitation is the foundation of sales. Completing the contract often is a mere formality when the stage of 'selling' the customer has been passed. \* \* \*

"It would seem therefore, that the mere solicitation rule should be abandoned when the soliciting activity is a regular continuous and sustained course of business, as it is in this case. It constitutes, in the practical sense, both 'doing business' and 'transacting business' and should do so in the legal sense. Although the rule has not been clearly and expressly repudiated by the Supreme Court, its integrity has been much impaired by the decisions which sustain jurisdiction when very little more than 'mere solicitation' is done."

When the corporation's activities are continuous and the cause of action arises out of those activities, its presence in the state can hardly be denied.

In *International Shoe Co. v. Washington*, 326 U. S. 310, 90 L. Ed. 94, the court states:

"Presence in the state in this sense has never been doubted when the activities of the corporation here have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given."



Here there was nothing irregular or casual about the activities of appellant within the state, but, on the contrary, they were continuous and resulted in a certain volume of business to the appellant. This fact was admitted by Elmer H. Preuer. He testified as follows at page 265 of the Transcript of Record:

“Q. What relationship do you have with the Woodworkers Tool Works of Chicago? A. We buy and sell machinery and supplies, and in our course of business there are certain items that are manufactured by the Woodworkers Tool Works which we sell on a commission basis.”

And at page 267:

“Q. Mr. Preuer, how often during a given year of business would you say you sell Woodworkers Tool Works products? A. Well, that is rather irregular. In other words, we may have a half dozen invoices, and none the next.

Q. *But do you have a running course of business with them every year?* A. *That is right.*

Q. You are involved in transactions in which the Woodworkers Tool Works sell products *at all times*, that is, you handle it? A. Not all of their products.

Q. I say some. A. *Some items, yes.*” (Italics ours.)

Here the local agent of appellant, Woodworkers Tool Works, Inc., which did business under an almost identical name as appellant company (Woodworkers Supply Company), solicited the sale of the item in question with the use of a catalogue supplied them by appellant and which bore on its cover the name of appellant company [R. 260, 261].



It is to be noted, also, that the local concern Woodworkers Supply Company did not issue a catalogue of its own.

In that connection we quote further from the testimony of Elmer H. Preuer in answer to questions asked him by the trial court [R. 268]:

“The Court: If a customer asks for one of their (the appellant’s) tools, you or the salesman will refer to the catalogue?

The Witness: That is correct.

The Court: So you identify the tool you want?

Witness: Yes.

The Court: You heard your salesman Mr. Townsend testify this morning?

Witness: Yes.

Court: He took the catalogue with him?

Witness: Yes.

Court: He had the catalogue when they gave the order?

Witness: Yes.

Court: That catalogue is made by them?

Witness: Yes.

Court: By the concern?

Witness: Yes.

Court: They turn it over to you for taking orders?

Witness: Yes.

Court: *You do not put out your own catalogue?*

Witness: No.

The Court: All right.” (Italics ours.)

In view of the preceding, it is apparent that the trial court accorded the appellant full opportunity to present evidence on the issue of jurisdiction and accepted a voluminous amount of evidence on the matter.

The appellee is entitled to the presumption of the validity of the trial court's determination and it should not be disturbed if there is any substantial evidence to support it.

*Lumas Film Corp. v. Superior Court*, 89 Cal. App. 384, 264 Pac. 792;

*Holland v. Superior Court*, 121 Cal. App. 523, 9 P. 2d 531.

It is submitted, therefore, that the authority and responsibilities of the person served here show that he is of sufficient character and rank that service of process upon him constituted service upon the appellant. That appellant's position that it can be sued only in Illinois is unsound; particularly when, as here, it is doing a large volume of California business in the manner above outlined, and the suit is with respect to that business, and service is made on the agent through whom appellant does a large part of that business and who was the medium through which the item in question in this suit was sold by appellant.

It is further submitted that appellant Company was properly served with summons in this action and was clearly doing business in such a manner as to subject itself to the jurisdiction of the courts of the Southern District of California.

II.

- A. The Verdict of the Jury and the Judgment in Favor of the Appellee Are Amply Supported by the Evidence; and,
- B. The Evidence Proves a Direct Causal Connection Between the Breaking of the Panel Raiser Head and the Injury Sustained by Appellee.

A.

No citation of authority is necessary to support the familiar rule of law that if there is any evidence, or if there is any reasonable inferences which may be drawn from the evidence, to sustain a verdict of the jury, then the appellate court is bound to affirm the judgment of the lower court entered upon such verdict.

Appellant seeks to impose the duty upon appellee of showing or “tending to show” that the appellant had the duty to do something more than make inspections they contend were made by them (App. Op. Br. p. 22).

Though the physical evidence in the case in the form of the broken panel head itself [Pltfs. Ex. 2] is compelling evidence that no such inspections were made by appellant, nevertheless appellee was under no obligation to show what appellant’s duty was.

However, in view of the inherent danger of this instrumentality when considered in the light of the use to which it properly was to be put, plaintiff did introduce evidence of further tests which were available to defendant to insure the safety of its products.

This same contention of appellant was raised by the manufacturers and rejected in the case of *Sheward, et al. v. Virtue, et al.*, 20 Cal. 2d 410, 126 P. 2d 345.

In that case the Supreme Court stated at page 413:

“Virtue Brothers further contend that a determination of the question whether they were negligent must be resolved by evidence of tests of discovering defects made by other manufacturers of similar articles. They argue that they should not have been required to make tests which were not customarily made by other manufacturers; that in the absence of evidence of what other manufacturers did to discover defects and that these appellants did not apply such tests, they may not be found guilty of negligence. Evidence of that character was not introduced at the trial of this case. In fact evidence was that no tests or special examinations for fractures were made by Virtue Brothers. Assuming that other manufacturers likewise made no special examination to discover fractures, such a custom would not excuse the failure of these appellants.”

A somewhat similar contention was rejected in the case of *Hughes v. Warman Steel Casting Co.*, 174 Cal. 556, 163 Pac. 885. In *Robinet v. Hawks*, 200 Cal. 265, 274, 252 Pac. 1045, this court said that the doctrine of customary usage does not apply to the question of legal duty under the law of negligence, or that the continuance of a careless performance of a duty would transform a party's negligence into due care, and in the middle of page 414 the court continues:

“The appropriate standard of care applicable to the facts of the present case is expressed in *O'Rourke v. Day and Night Water Heater Co., Ltd.*, 31 Cal. App. 2d 364, 88 P. 2d 191, to the effect that if the defective condition of the part could have been disclosed by reasonable inspection and tests, and such inspection *and tests* had been omitted, the defendant has been negligent.” (Italics ours.)

In *Smith v. Peerless Glass Co.*, 259 N. Y. 292 (181 N. E. 576), it was held that reasonable care consisted of making the inspections and tests during the course of manufacture and after the article was completed which the manufacturer should recognize were reasonably necessary to secure the production of a safe article. \* \* \* But if, as stated, the evidence justifies the jury's finding that the defendants omitted to apply any standard of reasonable inspection or other simple test which would have revealed the defect, and that the omission constituted negligence, the negligence would not be excused because other manufacturers did not make such tests.

It is to be noticed here, that all of the decisions in these cases refer to *tests*. At most defendant attempted to establish that "inspections" were made during the course of their manufacture of the panel raiser head, but nowhere is there any evidence in the record that any *tests* were made to insure the safety of the product except the test made by witness Missner [R. 358-9] which test was made after this action was filed by plaintiff and just before his deposition was to be taken! [R. 383.]

The appellant states in its opening brief:

"While the appellant *may* have had a duty to make an inspection of the panel raiser head it is not responsible for defects that cannot be found by a reasonable, practicable inspection" (App. Op. Br. p. 23). (Italics ours.)

In making this qualified commitment the appellant quotes from *Honea v. City Dairy, Inc.*, 22 Cal. 2d 614, 140 P. 2d 369, which, because it involved a latent defect, is not applicable to the instant case but tends only to qualify this sole concession in appellant's brief.

Assuming then, that it is agreed the appellant was under a duty to make an inspection of the panel head, is there any evidence in the entire record which would entitle appellant to represent that the defect here was a latent one and that there was no feasible means of discovering the defect or flaw available to the appellant? (App. Op. Br. p. 23.)

Appellee produced the only expert witness who testified at the trial: Gough L. Cheney. Mr. Cheney is a chemist and engineer of forty years' experience who has been employed by a reputable chemical and engineering company for thirty-five years. Mr. Cheney made a careful examination of the panel raiser head after it disintegrated [R. 172-173-174].

As to whether there was a feasible means of discovering the defect available to appellant, Mr. Cheney gave the following testimony:

At page 178 of the Transcript of Record:

“Q. I will ask you if, on the basis of your examination, you found any structural defects on this arm, this panel raiser head? A. Yes.

Q. Describe them. A. The defects which I could see after the arm broke on the upper member, there were a series of shrinkage cracks or blow-holes or imperfections in the metal. Those apparently reached the inner surface of the arm, *so that they were visible from the exterior surface*. There are also some minor porosities visible on the machined surface of the upper arm. Those are the most outstanding things that can be seen on the arm.

The Court: That conclusion you arrived at from the visual examination?

The Witness: Visual examination plus microscopic examination of specimens obtained from the other fractured surface of the arm."

At page 182:

"The Court: Is that porosity noticeable on any other portion of the structure, except the broken place?

The Witness: The greatest amount is in the vicinity of this fractured surface. There are also others to a lesser extent, which are visible on the bent arm. Even on the machined upper surface you can see where the small blow holes or pockets existed in the metal. The other arm seems to be quite sound, so far as the visual inspection goes."

Then at page 188:

"Q. Now, where did you find the weakest point of this panel raiser head arm to be? A. Mechanically the point that would take the greatest load is right where it broke.

Q. Where it broke. What point, if any, on the portion of where it broke would take the greatest stress? A. Approximately at the fractured surface, that is the greatest leverage.

Q. Where the blow-hole is? A. Yes sir.

Q. Did you measure the depth of the blow-hole? A. No. It is about half an inch deep.

Q. In answer to some of the questions by the court I think maybe you answered this, but I want to ask it again: In your opinion were those blow-holes and the excessive porosity in that cast steel discernible to the naked eye before the arm broke? A. Yes,



*I think fairly careful inspection would have shown them.*

Q. And not even necessarily tests? A. *Yes, I think those cavities in the broken arm could have been seen.*

Q. *With the naked eye?* A. *Yes.*

Q. *Without a microscope?* A. *Yes.*

Q. Was that casting painted after it was milled?  
A. It was painted. I don't know when.

Q. It couldn't be painted and then milled? It is painted, is it not? A. It is painted.

Q. In your opinion were the blow-holes and excess porosity in that arm more discernible or less discernible after it was painted or before it was painted? A. The paint filled up some of the porosity.

Q. *In other words, while it was being machined and not painted the blow-holes would be more apparent to the naked eye than they are now?* A. *In my opinion.*

Mr. Callaway: That is argumentative.

Q. (By Mr. Olson): I am just asking is that a fact? A. *Yes, I think they would be more apparent.*

Q. Would you point out to the jury where those blow-holes and where that porosity is apparent to the naked eye? A. Well, examination of this broken arm in the vicinity of the fractured face, you can see these blow-holes are where they come to the surface on the innerside. There are none apparent on the outer side. But then over on the arm, over here (indicating), that is bent. You can see them on the machined surface as well as down here in this bend (indicating)." (Italics ours.)



Appellants witness William Victor Knourek, vice-president in charge of production of appellant company had this to say regarding the question raised by appellant as to whether there was a feasible means of discovering the defect or flaw available to the appellant. (It is recalled that Mr. Knourek's testimony was taken by deposition. His testimony was read by Mr. Callaway and the questions put to him were read by Mr. Olson) [R. 304]:

“Mr. Olson: Now, what would the inspection or tests that are ordinarily made reveal, of the castings, I mean?

Mr. Callaway: *If the casting is defective we can see it immediately, when it comes in its rough state; and if there are any defects we can also tell later, when we start making cuts on the casting.*

Mr. Olson: By cuts you mean machining?

Mr. Callaway: Machining; yes, sir.

Mr. Olson: And the machining is done to smooth the casting up, is it?

Mr. Callaway: That is right.

Mr. Olson: And you can tell by your inspection and your tests whether it is a sound casting; is that correct?

Mr. Callaway: Most of the time we can.”

Then on page 306:

“Mr. Olson: Then what could be seen by your inspection, in the way of defects?

Mr. Callaway: Well, a crack in the casting.

Mr. Olson: Porosity?

Mr. Callaway: Porosity.

Mr. Olson: Blow-holes?

Mr. Callaway: Blow-holes.”

And, at page 317:

“Mr. Olson: Now a small blow-hole might not have any effect on the casting at all, is that right?”

Mr. Callaway: That is right.

Mr. Olson: But a large blow-hole might have a serious effect and might cause a grave structural defect?

Mr. Callaway: Yes.

Mr. Olson: And it would depend on the size of the blow-hole as to whether it constituted a structural defect, or not?

Mr. Callaway: *But a blow-hole that large would be detected in the machining of the casting.”*

At page 321 (here Mr. Lopardo of appellant council is asking the questions of Mr. Knourek and his answers are being read by Mr. Callaway):

“Mr. Lopardo: What I mean is, do you have standing instruction to all your working force what they are to look for in the process?”

Mr. Callaway: That is right.

Mr. Lopardo: What are they to look for?

Mr. Callaway: Well, they are to look for flaws in the castings, upon machining the casting; if they hit any blow-holes they are supposed to scrap the casting immediately. And then, the most important thing is size: or one of the important things is size, such as the hole diameter, and other different measurements of the tool.”

Mr. Charles E. Meissner, plant superintendent of appellant company on the same question, testified as follows. (Mr. Meissner's testimony was in the form of a deposition

and the reading of it was handled at the trial in the same manner as was the testimony of Mr. Knourek, *supra*.)

At page 340 of the transcript of record (the witness is explaining the various processes in the manufacturing of the panel raiser head):

“Mr. Lopardo: So the roughness is removed?

Mr. Callaway: The roughness is removed; and in doing so he would notice any imperfections that might be in that casting.”

At page 344:

“Mr. Lopard: And at that time is there any inspection made?

Mr. Callaway: Well, *he would see any noticeable defects* as he is machining off this rough surface.”

At page 400:

“Mr. Olson: Are blow-holes easily discovered in steel such as this?

Mr. Callaway: I would say you could see them, if they were there.

Mr. Olson: That is, they would be visible on inspection to the naked eye?

Mr. Callaway: If they were there.

Mr. Olson: Without a microscope?

Mr. Callaway: That is right.

Mr. Olson: You wouldn't even need glasses, if you had ordinary eyesight?

Mr. Callaway: That is right.”

At page 421:

“Mr. Olson: Did you make any test for hidden blow-holes?

Mr. Callaway: I said yes.

Mr. Olson: What was that test?

Mr. Callaway: Well—.

Mr. Olson: Go ahead, please.

Mr. Callaway: While it was machined.

Mr. Olson: All right, what was the test?

Mr. Callaway: *Well, when a man is machining he can tell if he runs through a blow-hole or not.*"  
(Italics ours.)

It is submitted that the foregoing is conclusive proof that we are not dealing here with a situation where the defect was a latent one as appellant would have it considered. That here is proof positive that inspection of the panel raiser head would have made its defect known to even the most casual inspector. Porosity, cavities, blow-holes and segregation are obvious to the naked eye. Accordingly the cases cited by appellant in support of this contention are not in point. All four cases cited in appellant's opening brief (p. 23) deal with defects which were latent, and where the defect, if any, could not be discovered by reasonably careful inspection.

The court will note, from the record that the defective panel raiser head which broke in this case causing the plaintiff's injuries was in the courtroom at the time of the trial and was introduced into the evidence as Plaintiff's Exhibits 2, 2-A, 2-B, 2-C and 2-D [R. 97]. Thus the jury had before it the portion of the panel raiser head which broke and was in a position to ascertain for itself from the excessive porosity, blow-holes and segregation which was evident to the naked eye of each juror the cause of its breaking. It was able to judge for itself whether the condition of the panel raiser head was such that the appellants, in the exercise of ordinary care,

should have discovered the defects in the course of the many inspections of the casting which they claim to have made.

We see then, from the record, that, in reality, the evidence established that the defective condition which existed at the time that the panel raiser head was in the hands of the appellant was one which was visible to the naked eye. The jury was entirely justified in concluding that such was the fact and that the appellants were negligent in failing to discover and provide against the defect which caused the injuries to appellant.

Appellant quotes extensively from the case of *Honca v. City Diary, Inc. (supra)*, in support of their contention and the following excerpt from that case is found on page 24 of appellant's brief:

"The limit of its (the manufacturer) duty was to provide against defect discernible upon reasonable inspection. \* \* \*"

Assuming that this may be considered an admission by appellant that it was under the same duty, it is submitted that the evidence clearly proves that the jury was justified in finding that that duty was not performed by appellant.

The case of *Sheward v. Virtue*, 20 Cal. 2d 410, 126 P. 2d 345, is one particularly in point with the present case.

It is stated by the court in that case at page 413:

"The evidence is sufficient, however, to support the implied finding of the jury that the defect existed when the casting was in the possession of the manufacturer and while it was being handled by its employees in the necessary processes before it became a part of a completed chair; that the defect was discernible if a careful visual examination for fractures

was made, that the manufacturer was negligent in failing to make such an examination and that its negligence was the proximate cause of the plaintiff's injuries."

In affirming judgment for the plaintiff in that case the court found the evidence justified the verdict although the defect complained of there was not nearly as apparent as are the defects in the instant case.

B.

Appellee is in complete agreement with appellant when it states:

"The question of casual connection should not be left to the guess, conjecture or surmise of the jury."  
(App. Op. Br. p. 30.)

However as stated in the memorandum opinion of the trial judge in *McKellar v. Pendergast*, 68 Cal. App. 2d 485, quoted by appellant in its opening brief (p. 30):

"A Plaintiff is not bound to negative every other conceivable theory or hypothesis which ingenuity may invent to account for his injury."

It is submitted that appellant here is demanding that appellee do just that.

"There is a clear distinction between casual connection and proximate cause. Casual connection may appear, though the negligent act be the remote and not the proximate cause."

*Alabama Power Co. v. Bass*, 119 So. 625, 628, 218 Ala. 586, 63 A. L. R. 1;

*Words and Phrases*, Vol. 6, p. 320.

The evidence here clearly proves that there was but one possible cause of plaintiff's injury; the distintegration of the panel raiser head a part of which struck plaintiff's hand before he was able to remove it from the level of the Shaper upon which he was working. Where, in the entire transcript of the proceedings, is there any evidence upon which the existence of any other cause can be premised?

In *San Joaquin Grocery Co. v. Trewhitt*, 80 Cal. App. 371, 252 Pac. 332, quoted by appellant (App. Op. Br. p. 30), which was an action to recover damages caused by water alleged to have drained into the basement of plaintiff's store from the adjoining property, the facts revealed, as stated in the court's opinion:

"there were the possibilities that the water which was afterward found in the plaintiff's basement was (1) rain-water; (2) water used for settling soil by the defendants as independent contractors; (3) water escaped from the three-quarter inch hose used by the masons (not the defendants), and (4) waters coming from other sources." (At p. 375.)

The court concluded (p. 376):

"So in this case the jury were left to merely guess where the waters found in plaintiff's basement had come from—whether said waters were those in division (1), (2), (3), or (4), as hereinafter indicated."

What other cause would the appellant have us believe was the reason for plaintiff's injury here? Appellant quotes at length from the testimony of the plaintiff (App. Op. Br. pp. 25 through 30). Where, in that testimony, does there appear any cause other than the distintegration of the panel head which might account for plaintiff's injury? There is none.



It was established that just before the injury to plaintiff the panel raiser head was revolving at 7200 revolutions per minute [R. 115]. It would obviously have been impossible for plaintiff to have seen what struck his hand even if he had not “ducked under the table” as he testified.

It was established that plaintiff never had an injury to his right hand before the accident [R. 169] and finally that plaintiff’s right hand was not cut ten seconds before the part disintegrated, but was cut as it did so [R. 1720].

In *McKellar v. Pendergast*, *supra*, the source of the substance on the floor (upon which plaintiff slipped and fell) was unknown. In the instant case the only single cause of the injury to plaintiff was not only known but proved.

It is therefore submitted that there is no merit whatsoever to this contention of appellant that the plaintiff failed to establish any causal connection between the breaking of the panel raiser head and the injury sustained by plaintiff. That the negligence of the appellant company in manufacturing an obviously defective part which was inherently dangerous was sufficient to establish the chain of causation from which the jury had no alternative but to find that the plaintiff’s injury was the result of the sudden disintegration and breaking apart of the Panel Raiser Head here in question.

See:

*McGee v. Fasulis*, 57 Cal. App. 2d 275.



It is assumed that there is no necessity to do more in answer to subdivisions 1 and 2, paragraph II of appellant's opening brief (p. 8), referring to appellant's motion for nonsuit on the grounds that the appellant did not manufacture the panel raiser head or sell it to appellee's employer, in view of the following facts:

In appellant's "statement of the case" on page 5 the following statement is found:

"The Champion panel raiser head in question was manufactured by the defendant Woodworkers Tool Works, Inc., an Illinois corporation, located at 222 South Jefferson Street, Chicago, Illinois."

In appellant's "Summary of Argument" on page 11, the following statement appears:

"The Champion panel raiser head, \* \* \* was manufactured by the appellant Woodworkers Tool Works Inc., an Illinois Corporation."

The answer of appellant to plaintiff's second amended complaint in paragraph I(D) thereof contains the following:

"Answering the incorporated paragraph V defendant admits that it sells Champion panel raiser heads; that it partially manufactured said article, \* \* \*"

The transcript of record is replete with evidence that the defendant manufactured the item in question [R. 285-6; 338-9].

The transcript of record also contains adequate proof that the appellant company sold the panel raiser head to defendant's employer through the agency of the Woodworks Supply Co. [R. 260-261, 266-267, 285, 338-339].

III.

The Trial Court Committed No Prejudicial Error in Instructing the Jury on the Doctrine of *Res Ipsa Loquitur*.

1. The Facts of This Case Entitled the Plaintiff to an Instruction to the Jury Given by the Court on the Doctrine of *Res Ipsa Loquitur*.

Appellant's contention that the plaintiff was not entitled to an instruction to the jury on the doctrine of *res ipsa loquitur* is; in brief, that in order for this doctrine to be applicable to a given case the defendant must have had, among other things, exclusive control of the instrumentality at the time of the event leading to the injury to the plaintiff.

Appellant further argues that the doctrine should not be held to be applicable in the instant case on the theory that the injury could have been caused by a number of speculative ways other than by the disintegration of the panel head causing a piece of it to strike plaintiff's hand. (App. Op. Br. pp. 32-33.)

In reply to the speculative explanations for the accident which are advanced by appellant it is submitted that the undisputed evidence proved that the panel head was properly installed [R. 111-115, 185]. There is no evidence that the blades of the panel head had received a blow of any kind before the part disintegrated. Mr. Cheney testified as follows on that question:

"Q. Did you find any evidence that the part that broke, the arm that broke, the blade that broke, had struck any object before it broke? A. *I don't see any evidence, in my opinion.* There are a few little marks on it. They don't appear to me to have been

there before this thing was flying around and hitting all kinds of things.

Q. Is this the blade from the broken part (indicating)? A. It is.

Q. Did you find any marks on it, to indicate it had struck any object of any kind, a spike, or anything? A. Yes, there are a few little marks on the cutter blade, but quite small. Under the microscope they seemed to have, in my opinion, to have come from the back side, rather than the front side.

Q. Which would have occurred when? A. Probably after it was broke and flying around and hitting all this other metal.” (*Italics ours.*)

It might be added here that Doctor Detwiler testified as follows when questioned by the court as to what had struck plaintiff's hand causing his injury [at page 241 of the Transcript of Record]:

“The Court: In this case you think the metal caused it? A. Yes, *I don't think there is any question in this case.*

The Court: All right, the reason I am asking is because the plaintiff himself could not tell what actually caused it, what his hand came in contact with that caused the injury, that is the reason I am asking you if you can make any deductions from the way it looked.

The Witness: *We felt there was no question it was a metallic instrument that had caused this.*

Q. (By Mr. Olson): From your observance of the wound when Mr. Byrne came in, would it be a forceful impact? A. Yes.

Q. Because of the shattering of the bone? A. Yes.

Q. Because of the breaking of the bone? A. Yes, and maceration of the tissue.

Q. What do you mean? A. Well, very vulgarly to describe it, chewed up, hamburger.” (Italics ours.)

Appellee’s counsel seeks to avoid the doctrine of *Res Ipsa Loquitur* as clearly stated by the Supreme Court of California in the case of *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P. 2d 436, by gratuitously stating that the application of the decision of the court in that case was intended to apply only in cases involving containers of carbonated beverages. The answer to that contention is that the decision in that case not only does not so confine its application but clearly makes its ruling of general application.

A review of California decisions long before and those decisions rendered after the *Escola* case (*supra*) discloses that the rule of *Res Ipsa Loquitur* has consistently been liberally applied by California courts and in a multitude of different factual situations.

The court states in the *Escola* case (*supra*):

“Many authorities state that the happening of the accident does not speak for itself where it took place sometime after defendant had relinquished control of the instrumentality causing the injury. *Under the more logical view, however, the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident*, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant’s possession.” Citing cases collected in *Honea v. City Dairy, Inc.* (*supra*). (Italics ours.)

Where in this decision by the Supreme Court of California does appellant find any indication that the decision was intended to apply only in cases involving containers of carbonated beverages? To the contrary the *Escola* case (*supra*) is referred to with approval in the more recent decision in *Ybarra v. Spangard*, 25 Cal. 2d 486, where the court approved the doctrine of *Res Ipsa Loquitur* in the case of an injury resulting from medical treatment.

In the *Ybarra* case (*supra*) the court makes the following comment:

"An examination of the recent cases, *Particularly in this state*, discloses that the test of actual exclusive control of an instrumentality has not been strictly followed, but exceptions have been recognized where the purpose of the doctrine of *res ipsa loquitur* would otherwise be defeated. Thus the test has become one of right of control rather than actual control." (Italics ours.)

The case of *Metz v. Southern Pac. Co.*, 51 Cal. App. 2d 260, 124 P. 2d 670, decided before the *Escola* case (*supra*) is one particularly in point with the instant case. There the plaintiff's husband was killed as a result of an accident which occurred when a light motor car in which he was riding overturned due to a structural defect. The court approved the giving of an instruction of the doctrine of *res ipsa loquitur* even though the deceased person was in actual control and operation of the motor car at the time of the accident.

The court stated (at p. 268):

"The requirement that the instrumentality must be under the management and control of the defendant, in the application of the doctrine of *res ipsa loquitur*, does not mean, nor is it limited to actual

*physical control*. It has been held to apply to the mere right of control of the instrument which causes the injury at the time of the accident.” (Citing cases.) (Italics ours.)

In *Van Horn v. Pacific Refining Etc. Co.*, 27 Cal. App. 105, 148, Pac. 951, cited by the court in *Metz v. Southern Pac.*, *supra*, is, it is submitted, another case directly in point with the present one. That case was decided in 1915, long prior to the *Escola* decision. It involved an injury which occurred as a result of the blowing off of a cap of a steampipe while the plaintiff was bending over the same during the course of his work. It is also to be noted that the particular steampipe had been installed by the defendant *three days* before the accident. In holding that the case was one to which the doctrine of *res ipsa loquitur* may be fairly and properly applied the court made the following comment (at p. 108):

“There are only three possible ways by which its (the cap) dislocation could be explained: either it was defectively constructed; or negligently and insufficiently affixed to the pipe; or else it had been tampered with and loosened to the point of danger under pressure by some one other than the defendant’s employees. In either of the first two of these possibilities the defendant would be liable. But the appellant contends that because the third possibility exists the doctrine of *res ipsa loquitur* can not be given application. In support of this contention counsel for the appellant argues that the mere fact that persons other than the defendant or its em-

ployees were working in and about the building and had access to the particular floor where this steam-pipe was located, would be sufficient to prevent the application of the rule, because some one or other of these might possibly have so struck or tampered with this pipe as to have caused the loosening of its cap to such an extent that it would be liable to blow off at any moment under pressure.

“We think this argument, unsustained as it is by any semblance of evidence or proof tending to show such interference with this pipe or cap, carries the possibilities in cases of this kind too far. To give it application would be to practically eliminate the doctrine of *res ipsa loquitur* from the law \* \* \*

“The rule declared in this and the other cases cited by appellant to the effect that the exclusive control and management of the appliance causing the injury must be shown to have been in the defendant must be taken to refer to the right of such control; otherwise, as we have seen, the doctrine of *res ipsa loquitur* could seldom if ever be given application.”

In *Rafter v. Dubrock's Riding Academy*, 75 Cal. App. 2d 621, 171 P. 2d 459, a case involving an injury which resulted from the slipping of a saddle on a horse, the same objection regarding the necessity of control being present in the defendant was made. In approving the application of the doctrine of *res ipsa loquitur* the court stated (at p. 626):

“Since the defendant corporation was not present by any of its officers when the ride took place, or



when the saddle broke or slipped the only control which may be attributed to it might be called "constructive control."

See also:

*McComas v. Al G. Barnes*, 215 Cal. 685, 12 P. 2d 630;

*Helms v. Pacific Gas & Electric*, 21 Cal. App. 2d 711, 70 P. 2d 247;

*Lejeune v. General Petroleum Corporation*, 128 Cal. App. 404, 18 P. 2d 429.

In the instant case it is undisputed that the defendant corporation had exclusive control of the panel raiser head at the time of the alleged negligent act, that the sudden disintegration of the head would not have ordinarily occurred in the absence of negligence on the part of the defendant, and that there was no evidence of interference with or improper installation of the panel head.

It is therefore submitted that the doctrine of *res ipsa loquitur* was properly applicable and no error was committed in the trial court instructing the jury on that doctrine.

It is further submitted that, without the application of the doctrine of *res ipsa loquitur*, the evidence adequately supports the verdict of the jury. That appellant's negligence as charged in the complaint was the sole and proximate cause of the injuries which were suffered by appellee.



IV.

The Special Damages Awarded to Plaintiff Were Pled  
and Proved by Plaintiff.

At the conclusion of the trial the court gave the jury an instruction upon Special Damages. That instruction *which was not objected to by appellant at any time* read in part as follows:

“You are instructed that special damages as distinguished from general damages are those which are natural but not necessary consequences of a negligent act. They are such as will compensate plaintiff for the reasonable value, not exceeding cost to plaintiff, of the examinations, attention, care by physicians and surgeons, reasonably required and actually given in the treatment of plaintiff, and reasonably certain to be required to be given in his future treatment, \* \* \* hospital accommodations \* \* \* and reasonably certain to be required and given in his future treatment, if any, and finally, the special damages are such as will compensate plaintiff for the reasonable value of the time lost, if any, by plaintiff since his injury wherein he has been unable to pursue his occupation, \* \* \* In determining this amount, you should consider such plaintiff’s earning capacity, \* \* \* and further consider the evidence as to the probability and possibility of plaintiff pursuing his occupation or any other occupation in the future.” [R. 448-449.]

Plaintiff’s Second Amended Complaint pleads as special damages that plaintiff since said accident has been totally

disabled from pursuing his usual occupation and has been under the care of physicians for said injuries and has incurred medical expenses in the sum of two hundred and fifty dollars and that further medical expenses are being incurred by plaintiff.

The plaintiff testified that he owed "between \$350.00 and \$400.00 in medical bills incurred on account of his said injuries [R. 202]. That as a result of his injury he was unemployed from the date of the accident, October 28, 1948, until January 10, 1949, a period of approximately two and one-half months, that he was laid off from work in the first week of February, 1949, and was not employed until July of 1949, a period of approximately six months [R. 149-150]; a total therefore of eight and one-half months of loss of earnings was proved. The plaintiff further testified that he earned approximately \$64.00 per week or \$256.00 per month [R. 137]. A loss of earnings therefore of \$2176.00, in addition to his medical costs.

It was testified by two of the doctors who treated plaintiff that plaintiff's injury requires future surgery [R. 212, 238]. That such operation would require a week's hospitalization and would cost approximately \$300.00 to \$500.00 [R. 215].

In view of the instruction of the court on the subject of special damages and the above referred to pleadings and proof it is submitted that the amount awarded plaintiff for special damages was fully justified and that the said special damages were pleaded and proved by plaintiff.

Appellant in his Memorandum of Points and Authorities in Support of Motion for Judgment *Non Obstante Veredicto* or for a New Trial [R. 57] has this to say regarding plaintiff's special damages (at p. 58):

“In recapitulation, therefore, plaintiff's special damages could not possibly be more than \$400.00 for medical expenses and \$1024.00 for loss of earnings, or a total of \$1424.00.”

With this admission by appellant, in view of the fact that the special damages awarded plaintiff was in the amount of only \$1000.00, appellant's contention that appellee did not plead and prove the special damages awarded appellee lacks consistency as well as support by the rest of the record.

Appellant quotes from *California Jury Instructions*, published by West Publishing Company (App. Op. Br. p. 34), and indicates his approval of this publication. It is therefore to be noted that Number 174-F thereof, on the subject of special damages, includes the following element:

“The reasonable value of the time lost, if any, by said plaintiff since his injury wherein he has been unable to pursue his occupation. In determining this amount, you should consider evidence of said plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned in the time lost had he not been disabled.”

V.

**The Foreman of the Jury Did Not Impeach the Verdict of the Jury. The Verdict and Judgment as Originally Entered Was the Result of a Clerical Error and Was Properly Corrected by the Trial Court.**

Though, as appellant states (App. Op. Br. p. 38), the affidavit of the foreman of the jury George F. Caldwell was signed by affiant sixteen days after the verdict was rendered, it is to be noted that the affidavit states that the affiant realized that he had made a clerical error "fifteen minutes after said verdict was returned and the jury was discharged" [R. 64].

The appellant would have it believed that the trial court in correcting the verdict in accordance with the obvious intention of the jury committed "grave prejudicial error." Such a view is not supported by the cases cited by appellant or any authority that we have been able to find.

Without exception, the cases cited by appellant (App. Op. Br. p. 37) involve instances where the jury by affidavit or otherwise attempted to impeach their verdict or explain the circumstances under which their decision was made.

It is to be recalled that the jury did not arrive at its verdict until 1:45 A. M., Tuesday, February 21, 1950, after having deliberated for a period in excess of twelve hours [R. 456, 485].

That a verdict was arrived at ten minutes before the jury was to again report to the court upon their deliberations [R. 64].

Under such circumstances a clerical error in the filling in and signing of the verdict unanimously agreed to by the jury certainly is not surprising.

The affidavit of George F. Caldwell, foreman of the jury [R. 63-64], is consistent with the evidence, and the circumstances surrounding his erroneously filling in the amount of general damages awarded and the special damages awarded in the wrong spaces in the prepared form of verdict.

The law clearly recognizes the power of a trial court to amend a jury verdict which is obviously the result of inadvertence and does not reflect the intention of the jury and which verdict is not even consistent with the evidence.

*Here the affidavit was offered not for the impeachment of the verdict, but rather to make a clerical correction.*

The case of *Freid v. McGrath*, 135 F. 2d 833 (1943), is a Federal court decision particularly in point with the question here involved. There the jury returned a verdict in favor of the plaintiff for \$425.00. *Which verdict the jury expressly confirmed after the verdict was read in open court.* Upon affidavits of several of the jurors it was obvious that the jury intended to return a verdict which would result in plaintiff being entitled to the sum of \$850.00 instead of \$425.00.

The Court of Appeal held that:

“If the jury actually found a verdict in the amount of \$850.00 but *mistakenly* apportioned that amount between two defendants, the District Court *if properly convinced of that fact*, would have power to correct the verdict accordingly: so that it would express the conclusion actually reached, and finally agreed upon by the jury—but *mistakenly reported to the court.*” (Italics ours.)

The court in its opinion made the following comment:

"If any question remains as to what constitutes the true verdict of the jury, it must be decided by the District Court, in the proper exercise of its discretion, using such information as may be available to it. \* \* \* Where the jury's error is patent on the face of the verdict, the court should so amend the verdict as to make it conform to correct legal principles. *But where the mistake is latent in and not apparent on the face of the verdict, it is sometimes proper to receive the affidavits of the jurors to ascertain their true verdict.*" (Italics ours.)

It is stated by the court in *Consolidated Rendering Co. v. New Haven Hotel Co.*, 300 Fed. 627 (at p. 629):

"A distinction has arisen in the consideration of cases in which the verdict of a jury is sought to be corrected between those cases which present a situation where there has been a misapprehension as to the law, error in computation, irregular or illegal methods, of a misunderstanding as to how the proceeds are to be divided, as in the case at bar, and those cases which show that there has been a clerical error in the real verdict which the jury actually agreed upon. In the former class the evidence of the jurors is invariably excluded, in the latter case the correction is made.

Also see *Bateman v. Donovan*, 131 Fed. 759 (at p. 765):

"\* \* \* many cases have recognized that in some instances affidavits and testimony of jurors may properly be admitted, such as for the purpose of correcting clerical mistake in the jury's uttered verdict \* \* \*

“If a verdict is informal, but otherwise sufficient, in that it is responsible to all the issues the Court may enter it in proper form.”

*Cyclopedia of Federal Procedure* (2d Ed.), Vol. 8, p. 18.

California also recognizes the authority of the trial court to amend a jury verdict to make it properly reflect the intent of the jury.

A California decision on precisely the same question as the one at bar is found in *Phipps v. The Superior Court of Alameda County*, 32 Cal. App. 2d 371, 89 P. 2d 698. There the jury rendered its verdict in favor of the plaintiff and against the defendant and awarded the plaintiff \$2500.00 against each of the defendants. The trial court ordered the verdict corrected so as to make the total verdict for \$2500.00 instead of \$5000.00. In affirming this action by the trial court it was stated:

“Admittedly a trial court upon its own motion or on *ex parte* application has jurisdiction to correct mistakes in its orders and records which are not actually the result of the exercise of judgment.” (Quoting *Estate of Burnett*, 11 Cal. 2d 259, 79 P. 2d 89.)

At page 374 the court states:

“The court does not have the right to correct a proper judgment but it has the right to change the judgment in accordance with the actual decision.” (Citing cases.)



See also:

*Weddle v. Loges*, 52 Cal. App. 2d 115, 125 P. 2d 914;

*Curtis v. San Pedro Transportation Co.*, 10 Cal. App. 2d 547, 75 P. 2d 1072;

*Truebody v. Jacobson*, 2 Cal. 281.

Accordingly, it is submitted that there occurred no "grave Prejudicial error" or any error at all by the trial court in correcting the verdict in this case.

### Conclusion.

It is therefore respectfully submitted that:

1. The defendant, Woodworkers Tool Works, Inc., a corporation, was properly served with process in this action and was subject to the jurisdiction of the District Court of the Southern District of California.
2. That the defendant company was guilty of negligence, that that negligence was the direct and proximate cause of plaintiff's injury, and that there was a direct causal connection between the breaking of the panel head and the injury sustained by the plaintiff.
3. That the doctrine of *res ipsa loquitur* was applicable in this case.
4. That the special damages awarded to the plaintiff were supported by the evidence and were not contrary to law.
5. That the foreman of the jury did not impeach the verdict of the jury but merely called the trial court's attention to a clerical error committed upon his part in filling out the verdict.



It is therefore urged that there were no errors committed at the trial and that appellant motion to dismiss, motion for nonsuit, motion for directed verdict and motion for judgment *non obstante veredicto* were properly denied.

Accordingly it is respectfully submitted that no grounds for reversal of the judgment exist in the instant case.

Respectfully submitted,

JOHN W. OLSON,

*Attorney for Appellee.*



No. 12549

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United States  
Court of Appeals  
for the Ninth Circuit.

---

MIKE J. FEELEY,

Appellant,

vs.

TIGHE E. WOODS, Housing Expediter, OFFICE  
OF THE HOUSING EXPEDITER,

Appellee.

---

Transcript of Record

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Appeal from the United States District Court,  
Western District of Washington,  
Northern Division.

JUL 24 1950

PAUL P. O'BRIEN



No. 12549

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF COUNSEL

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C. E. KNOWLTON, JR.,

905½ Third Avenue,  
Seattle, Washington,

Attorney for Appellee.

In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.

No. 2201

TIGHE E. WOODS, Housing Expediter, OFFICE  
OF THE HOUSING EXPEDITER,

Plaintiff,

vs.

MIKE J. FEELEY,

Defendant.

### COMPLAINT

Comes now plaintiff above named and alleges:

#### I.

That plaintiff is the duly appointed, acting and qualified Housing Expediter, Office of the Housing Expediter, an agency of the United States government created by the Veterans Emergency Housing Act of 1946 as amended (50 U.S.C.A. App. 1821 et seq.), and brings this action on behalf of the United States of America pursuant to the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1948 (50 U.S.C.A. App. Secs. 1881-1906).

#### II.

Jurisdiction of this action is conferred upon this Court by Sec. 206(b) of the Act.

#### III.

That the defendant, Mike J. Feeley, residing at 1535 Bellevue Avenue, Seattle, Washington, has

been at all times mentioned herein the landlord and operator of certain controlled multiple unit housing accommodations located at 1535 Bellevue Avenue, Seattle, Washington, and at all times hereinafter mentioned this defendant has rented and offered for rent certain of the units within said housing accommodations.

#### IV.

That in the judgment of the Housing Expediter the defendant has engaged in acts and practices which constitute a violation of Sec. 206(a) of the said Act in that this defendant has since July 1, 1947, demanded and received rentals in excess of the otherwise maximum applicable rents for the use and occupancy of certain of the units within the housing accommodations operated by him and located at 1535 Bellevue Avenue, Seattle, Washington, by charging the tenants for and on account of the periods and for the use and occupancy of the units the rentals all as set forth in Exhibit "A" attached to this Complaint and hereby made a part hereof, when the maximum rentals established under and pursuant to the said Act were no more than those set forth in the said Exhibit "A," all of which resulted in the overcharges therein computed.

Wherefore plaintiff prays:

1. For a temporary and permanent injunction restraining the defendant, Mike J. Feeley, together with his agents and servants from renting or offering for rent any of the accommodations located at

1535 Bellevue Avenue, Seattle, Washington, at rentals in excess of the otherwise applicable maximum rentals as established pursuant to the said Housing and Rent Act.

2. For an Order of the Court directing the defendant, Mike J. Feeley, to restore those sums already exacted from his various tenants for the use and occupancy of the units occupied by such tenants in excess of the otherwise applicable maximum rentals as established therefor and pursuant to the Housing and Rent Act of 1947, as amended, to wit:

Tenant	Overcharge
A. Joseph .....	\$ 207.96
J. Harvey .....	245.01
R. Buckholtz .....	214.16
T. Smith .....	245.75
J. McQuire )	
V. Schultz ).....	169.20
C. Bruhahn )	
Hutton & Whiteside .....	19.60
Martell .....	86.20
J. Fisher .....	94.40
C. Gabel & E. Thompson .....	148.69
J. Reese .....	19.50
C. H. Mullin .....	55.76
W. Ashwell .....	169.50
C. G. Hunter .....	207.53
D. Dunn and M. Sewall .....	344.68
R. E. Best .....	94.18
E. L. Cheshier .....	147.20
D. W. Huest .....	78.35

Tenant	Overcharge
C. E. Mintz .....	51.41
M. Thompson & L. Asplund .....	26.84
J. D. Anderson .....	102.79
D. Young .....	17.14
H. Christensen .....	267.01
C. Allen .....	27.04
M. Nick .....	6.72
F. L. Evans .....	203.70
C. Forsmark & F. Wetzel.....	16.87
D. King     )	
L. Webb     )	
L. Palmer    ).....	30.50
B. Langley   )	
Lancaster & Hulbert .....	124.18
J. Williscraft .....	69.02
A. Graspulis   )	
B. Lyons     ).....	285.74
Liebel    )	
Nick     ) .....	5.45
S. Bakke .....	54.50
S. Carithers .....	25.50
F. W. Riass .....	24.50
B. Ridders .....	169.50
	<hr/>
	\$4056.08

and if for any reason the said tenants or any of them be not entitled in equity and good conscience to receive such refund, or cannot be found, then in the alternative the Court order such money paid

over to the Treasurer of the United States, all for the purpose of enforcing compliance of said Act.

3. For the costs of this action.

4. For such other and further relief as the Court may deem just and equitable.

Dated at Seattle, Washington, this 21st day of February, 1949.

/s/ CLINTON J. CRANDALL,

/s/ C. E. KNOWLTON, JR.,

Attorneys for Plaintiff.

Address:

Office of Housing Expediter,  
905½ Third Avenue,  
Seattle 4, Washington.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT

The Defendant answering the Plaintiff's Complaint denies and alleges as follows:

I.

Defendant admits Paragraph III of the Complaint.

II.

Defendant denies each and every allegation contained in Paragraph IV and the whole thereof.

Wherefore, Defendant having fully answered, prays that the action of the Plaintiff be dismissed and that he have Judgment against the Plaintiff for all his costs and disbursements herein incurred.

/s/ MARK M. LITCHMAN,  
Attorney for Defendant.

[Endorsed]: Filed March 17, 1949.

[Title of District Court and Cause.]

### AMENDED ANSWER

The defendant, by way of an Amended Answer, denies and alleges as follows:

#### I.

Defendant, answering Paragraph II of the complaint, denies the same.

#### II.

Defendant denies Paragraph III of the complaint.

#### III.

Defendant denies Paragraph IV of the complaint and all and every part thereof.

By way of a further and separate defense to the action, defendant alleges as follows:

That a little more than a year ago the defendant purchased the building located at 1535 Bellevue Avenue, Seattle, Wash., formerly known as the Pinevue Apartments, and that at the time, or shortly thereafter, the building was about to be condemned by the health department and the fire department as being untenable because it was infected with rats and it had been, and was being, operated as dangerous to life and property in violation of the building and fire department's ordinances and rules and regulations of the City of Seattle; that the defendant requested, before condemnation thereof, an opportunity to make the building habitable; that he thereupon ordered all tenants to vacate said prem-



ises and spent a considerable amount of money in renovating said building to make it fit for human habitation.

That some time in August of 1948, he opened the said building for occupancy as a hotel in compliance with Sec. 6860 of Rem. Rev. Statutes of Washington, and kept a hotel register as required by Sec. 6861 of Rem. Rev. Statutes of Washington. That he advertised the said premises as an apartment-hotel and rendered all customary services furnished by a hotel in the City of Seattle excepting that of a bell hop, which was for the reason that it was a small hotel and did not require such service; that the defendant himself performed such services whenever they were required.

That defendant charged reasonable rents for his rooms and apartments and that he is entitled to continue operating the said premises as an apartment-hotel without being required to charge the rate required under the "Housing and Rent Act" of 1947 or 1948.

Wherefore, defendant prays for a judgment dismissing plaintiff's action.

/s/ MARK W. LITCHMAN,  
Attorney for Defendant.

Duly verified.

Copy received.

[Endorsed]: Filed August 20, 1949.

[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated between the plaintiff and the defendant by their respective undersigned attorneys, C. E. Knowlton, Jr., attorney for the Housing Expediter, and Mark M. Litchman, attorney for the defendant, that for the purpose of narrowing the proof on the trial of the cause above entitled, that the following facts are true and correct and no proof need be offered by either party concerning them; however, that the parties reserve all objections as to the materiality or admissibility of such facts.

1. That Tighe E. Woods was at the time of the commencement of this action and now is the duly appointed and qualified Housing Expediter.

2. That the defendant, Mike J. Feeley, since about June 5, 1948, has been the landlord and operator of a certain multiple unit housing accommodation located at 1535 Bellevue Avenue in the city of Seattle, Washington.

3. That the defendant made the rental charges of the tenants named and for the periods as set forth in the Schedule hereto attached marked Exhibit "A" at such location located at 1535 Bellevue Avenue, Seattle, Washington.

4. That the maximum rentals as established by an Order of the Rent Director of the Puget Sound Defense Rental Area for the respective units within the structure located at 1535 Bellevue Avenue, Se-

attle, Washington, on June 3, 1943, without any change being made thereafter until the Order referred to in Par. 5 of this Stipulation is set forth in such Exhibit "A" and columnized in such Exhibit under "Maximum Rent at the time of Rental Charge."

5. That the maximum rentals for the various units within the concerned accommodation as ultimately established for the same various units referred to in this Stipulation were established by order of the Rent Director dated May 18, 1949, and effective January 17, 1949, and are set forth under the column marked "Maximum Rent as ultimately established" in such Exhibit "A." That this Order was effective as of the date the landlord filed the petition at the Office of Housing Expediter for increase of rent, and none of the rental charges set forth in such Exhibit were affected by the terms of this Order.

6. That no Order has been made affecting the maximum rentals in any of the units within the accommodation located at 1535 Bellevue, Seattle, Washington, since the Order referred to in Par. 5 of this Stipulation, nor has the rental on any of these units been changed by any lease executed under or pursuant to the Housing and Rent Act of 1947, as amended.

7. That the difference between the maximum rentals as established by the Order of June 3, 1943, and in effect during the period set forth in such

Exhibit "A" and the rental charged during such period is set forth under the column marked "Over-charge List No. 1."

8. That the difference between the maximum rent as ultimately established by the Order of May 18, 1949, heretofore referred to as set forth in such Exhibit "A" under the column marked "Over-charge List No. 2."

9. That the reason why the Order of May 18, 1949, was issued by the Office of Housing Expediter was based upon the fact that the landlord completely rehabilitated the premises and changed the units therein from unfurnished to furnished, installed refrigerators, provided maid services, bedding and linen, laundry of linen, lights, cooking fuel and dishes and utensils, all of which services and improvements the persons heretofore named as tenants in such Exhibit "A" enjoyed during their respective terms of occupancy.

10. That the structure here concerned with prior to about June, 1948, had been operated as an apartment house, and about June 5, 1948, the defendant evicted all of the then tenants and occupants on the grounds then provided for by the Housing and Rent Act, and specifically for the reason that he wanted possession of the premises to make repairs and improvements on the premises which could not be done with the tenants in occupancy. Such repairs were made and the structure was reopened for occupancy on or about September 1, 1948. While no structural

changes were made in the individual units (the same units in the same space existed upon reopening as existed prior thereto) all of the apartments were redecorated, cleaned up and generally rehabilitated with a new roof placed upon the building in addition to the other services heretofore enumerated, which had not been theretofore provided to the tenants. As a matter of fact, prior to such evictions followed by repairs, the City of Seattle Health Department and the City of Seattle Fire Department had requested that numerous repairs and improvements be made to the structure herewith concerned or, in the alternative, that such structure would be ordered condemned.

Upon its reopening in September, 1948, an awning was placed in front of the structure bearing the legend "Feeley's Apartment Hotel." However, there is no contention that prior to about September 1, 1948, the structure was known or operated in any way except as a low class apartment house accommodation.

Dated at Seattle, Washington, this 14th day of October, 1949.

/s/ C. E. KNOWLTON, JR.,  
Attorney, Office of Housing  
Expediter.

/s/ MARK M. LITCHMAN,  
Attorney for Defendant.



## EXHIBIT "A"

Landlord—Mike J. Feeley

1535 Bellevue Avenue, Seattle

Unit	Tenant	Period	Charge for Period	Max. Rent for Time of Rental Charge	Overcharge List #1	Max. Rent as Ultimately Est.	Overcharge List #2
# 1	A. Joseph	3 mos. 20 days 9-22-48/1-11-49	\$265.00	\$22.00 per mo. or 80.66 for period	\$184.34	\$ 55.50 per mo. 204.00 for period	\$ 61.00
# 3	J. Harvey	2 mos. 2 days 9-8-48/11-10-48	180.00	22.50 per mo. or 46.50 per period	133.50	56.00 per mo. 115.73 for period	65.73
# 3	R. Buekholtz	2 mos. 2 days 11-8-48/1-10-49	162.00	22.50 per mo. or 46.50 per period	115.50	56.00 per mo. 115.73 for period	46.27
# 4	T. Smith	4 mo. 11 days 9-5-48/1-16-49	344.00	22.50 per mo. 98.25 for period	245.75	56.00 per mo. 265.03 for period	78.97
# 5	J. McGuire ) V. Schultz ) C. Bruhahn )	2 mo. 2 days 9-5-48/11-7-48	225.00	27.00 per mo. 55.80 for period	169.20	63.50 per mo. 131.23 for period	93.77
# 5	Hutton & Whiteside	6 days 11-7-48/11-13-48	25.00	27.00 per mo. 5.40 for period	19.60	63.50 per mo. 12.30 for period	12.31
# 5	Martell	1 mo. 2 days 11-7-48/12-9-48	115.00	27.00 per mo. 28.80 for period	86.20	63.50 per mo. 67.73 for period	47.27
# 5	J. Fisher	1 mo. 4 days 12-10-48/1-14-49	125.00	27.00 per mo. 30.60 for period	94.40	63.50 per mo. 71.96 for period	53.04
# 6	C. Gabel and E. Thompson	1 mo. & 26 days 9-7-48/11-2-48	200.00	27.50 per mo. 51.31 for period	148.69	64.00 per mo. 119.45 for period	80.55
# 6	J. Reese	6 days 11-3-48/11-9-48	25.00	27.50 per mo. 5.50 for period	19.50	64.00 per mo. 12.67 for period	12.33
# 6	J. Harvey	1 mo. and 12 days 11-10-48/12-22-48	150.00	27.50 per mo. 38.49 for period	111.51	64.00 per mo. 89.59 for period	60.41
# 6	C. H. Mullen	21 days 12-22-48/1-12-49	75.00	27.50 per mo. 19.24 for period	55.76	64.00 per mo. 44.79 for period	30.21
# 7	R. Buekholtz	1 month 9-12-48/10-12-48	75.00	22.50 per mo. 22.50 for period	52.50	56.00 per mo. 56.00 for period	19.00
# 7	W. Ashwell	3 mo. & 4 days 10-10-48/1-14-49	240.00	22.50 per mo. 70.50 for period	169.50	56.00 per mo. 175.46 for period	64.54
# 8	C. G. Hunter	4 mo. and 1 day 9-7-48/1-8-49	298.28	22.50 per mo. 90.75 for period	207.53	56.00 per mo. 225.86 for period	72.42
# 9	D. Dunn and M. Sewall	4 mo. 4 days 9-7-48/1-11-49	448.00	25.00 per mo. 103.32 for period	344.68	59.50 per mo. 245.93 for period	202.07
#10	R. E. Best	14 days 9-3-48/9-17-48	44.00	23.00 per mo. 10.72 for period	33.38	56.50 per mo. 26.16 for period	17.84
#10	E. L. Cheshier	10 days 9-18-48/9-28-48	31.45	23.00 per mo. 7.60 for period	23.85	56.50 per mo. 18.83 for period	12.62
#10	D. W. Huest	1 mo. 2 days 9-28-48/10-29-48	102.88	23.00 per mo. 24.53 for period	78.35	56.50 per mo. 60.26 for period	42.62
#10	C. E. Mintz	21 days 10-30-48/11-20-48	67.50	23.00 per mo. 16.09 for period	51.41	56.50 per mo. 39.54 for period	27.96
#10	M. Thompson and L. Asplund	11 days 11-19-48/11-30-48	35.37	23.00 per mo. 8.43 for period	26.84	56.50 per mo. 20.71 for period	14.66
#10	J. D. Anderson	1 mo. 6 days 11-30-48/1-4-49	112.50	23.00 per mo. 27.60 for period	84.90	56.50 per mo. 67.79 for period	44.71





## EXHIBIT "A"—(Continued)

Landlord—Mike J. Feeley

1535 Bellevue Avenue, Seattle

Unit	Tenant	Period	Charge for Period	Max. Rent for Time of Rental Charge	Overcharge List #1	Max. Rent as Ultimately Est.	Overcharge List #2
#10	D. Young	7 days 1-8-49/1-15-49	22.50	23.00 per mo. 5.36 for period	17.14	56.50 per mo. 13.18 for period	9.32
#11	H. Christenson	4 mos. 18 days 9-8-48/1-26-49	366.00	21.50 per mo. 98.89 for period	267.01	55.00 per mo. 252.99 for period	113.01
#12	C. Allen	14 days 9-10-48/9-23-48	38.00	23.50 per mo. 10.98 for period	27.04	57.00 per mo. 26.60 for period	11.40
#12	M. Niek	6 days 9-25-48/10-1-48	11.42	23.50 per mo. 4.70 for period	6.72	57.00 per mo. 11.40 for period	.02
#12	F. Evans	3 mo. 6 days 10-1-48/1-7-49	268.00	23.50 per mo. 75.20 for period	192.80	57.00 per mo. 182.40 for period	85.60
#14	C. Forsmark and F. Wetzel	8 days 9-10-48/9-17-48	25.00	30.50 per mo. 8.13 for period	16.87	67.00 per mo. 17.86 for period	7.14
#14	R. E. Best	21 days 9-17-48/10-8-48	82.14	30.50 per mo. 21.34 for period	60.80	67.00 per mo. 46.89 for period	35.25
#14	R. Buekholtz	21 days 10-9-48/10-30-48	67.50	30.50 per mo. 21.34 for period	46.16	67.00 per mo. 46.89 for period	20.61
#14	D. King ) L. Webb ) L. Palmer ) B. Langley )	14 days 10-25-48/11-8-48	45.00	30.50 per mo. 14.22 for period	30.50	67.00 per mo. 31.26 for period	13.74
#14	Lancaster and Hulbert	1 mo. 20 days 11-12-48/12-31-48	175.00	30.50 per mo. 50.82 for period	124.18	67.00 per mo. 111.66 for period	63.34
#14	J. D. Anderson	7 days 1-4-49/1-11-49	25.00	30.50 per mo. 7.11 for period	17.89	67.00 per mo. 15.63 for period	9.37
#15	J. Williseraft	28 days 9-4-48/10-2-48	93.00	26.00 per mo. 23.98 for period	69.02	62.50 per mo. 58.32 for period	34.68
#15	A. Drasgulis and B. Lyons	3 mos. and 13 days 10-2-48/1-15-49	375.00	26.00 per mo. 89.26 for period	285.74	62.50 per mo. 214.57 for period	160.43
#16	A. Joseph	13 days 9-9-48/9-22-48	32.50	20.50 for mo. 8.88 for period	23.62	54.00 per mo. 23.40 for period	9.10
#16	B. Liebel and M. Niek	3 days 9-22-48/9-25-48	7.50	20.50 per mo. 2.05 for period	5.45	54.00 per mo. 5.40 for period	2.10
#16	F. L. Evans	6 days 9-25-48/10-1-48	15.00	20.50 per mo. 4.10 for period	10.90	54.00 per mo. 10.80 for period	4.20
#16	E. L. Cheshier	2 mos. 9 days 9-28-48/12-6-48	170.50	20.50 per mo. 47.15 for period	123.35	54.00 per mo. 124.20 for period	46.30
#16	S. Bakke	1 month 12-9-48/1-8-49	75.00	20.50 per mo. 20.50 for period	54.50	54.00 per mo. 54.00 for period	21.00
#17	S. Carrithers	14 days 9-9-48/9-23-48	36.00	22.50 per mo. 10.50 for period	25.50	56.00 per mo. 26.12 for period	9.88
#17	F. W. Riass	14 days 9-22-48/10-6-48	35.00	22.50 per mo. 10.50 for period	24.50	56.00 per mo. 26.12 for period	8.88
#17	B. Riddes	3 mos. & 4 days 10-5-48/1-9-49	240.00	22.50 per mo. 70.50 for period	169.50	56.00 per mo. 175.46 for period	64.54
				Total	\$4056.08		\$1890.21



In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.

No. 2201

TIGHE E. WOODS, Housing Expediter, OFFICE  
OF THE HOUSING EXPEDITER,  
Plaintiff,

vs.

MIKE J. FEELEY,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

This matter having come duly on for trial the 14th day of October, 1949, before the Honorable Lloyd L. Black, United States District Judge, sitting without a jury, C. E. Knowlton, Jr., appearing for the plaintiff, and Mark M. Litchman appearing for the defendant, and the Court having heard the evidence submitted and having inspected the premises and considered the Briefs filed by counsel, the Court now makes its

Findings of Fact

as follows:

I.

That the defendant, Mike J. Feeley, is and has been the landlord and operator of a certain housing accommodation located at 1535 Bellevue Avenue in the city of Seattle, Washington, from September 1, 1948, to the present.

## II.

That the defendant charged the following persons the following sums as rent for the use and occupancy of the described units within the said accommodation and for the periods stated as follows:

Unit	Tenant	Period of Occupancy	Chg. for Period
1	A. Joseph .....	9-22-48/ 1-11-49	\$265.00
3	J. Harvey .....	9- 8-48/11-10-48	180.00
3	R. Buckholtz .....	11- 8-48/ 1-10-49	162.00
4	T. Smith .....	9- 5-48/ 1-16-49	344.00
5	J. McGuire ) V. Schultz ) .....	9- 5-48/11- 7-48	225.00
	C. Bruhahn )		
5	Hutton & Whiteside .....	11- 7-48/11-13-48	25.00
5	Martell .....	11- 7-48/12- 9-48	115.00
5	J. Fisherman .....	12-10-48/ 1-14-49	125.00
6	C. Gabel and E. Thompson..	9- 7-48/11- 2-48	200.00
6	J. Reese .....	11- 3-48/11- 9-48	25.00
6	J. Harvey .....	11-10-48/12-22-48	150.00
6	C. H. Mullen .....	12-22-48/ 1-12-49	75.00
7	R. Buckholtz .....	9-12-48/10-12-48	75.00
7	W. Ashwell .....	10-10-48/ 1-14-19	240.00
8	C. G. Hunter .....	9- 7-48/ 1- 8-49	298.28
9	D. Dunn and M. Sewell .....	9- 7-48/ 1-11-49	448.00
10	R. E. Best .....	9- 3-48/ 9-17-48	44.00
10	E. L. Cheshier .....	9-18-48/ 9-28-48	31.45
10	D. W. Huest .....	9-28-48/10-29-48	102.88
10	C. E. Mintz .....	10-30-48/11-20-48	67.50
10	M. Thompson and L. Asplund .....	11-19-48/11-30-48	35.37
10	J. D. Anderson .....	11-30-48/ 1- 4-49	112.50
10	D. Young .....	1- 8-49/ 1-15-49	22.50
11	H. Christenson .....	9- 8-48/ 1-26-49	366.00
12	C. Allen .....	9-10-48/ 9-23-48	38.00
12	M. Nick .....	9-25-48/10- 1-48	11.42
12	F. Evans .....	10- 1-48/ 1- 7-49	268.00
14	C. Forsmark and F. Wetzel	9-10-48/ 9-17-48	25.00
14	R. E. Best .....	9-17-48/10- 8-48	82.14
14	R. Buckholtz .....	10- 9-48/10-30-48	67.50
14	D. King ) L. Webb ) .....	10-25-48/11- 8-48	45.00
	L. Palmer )		
	B. Langley )		
14	Lancaster and Hulbert .....	11-12-48/12-31-48	175.00
14	J. D. Anderson .....	1- 4-49/ 1-11-49	25.00
15	J. Williseraft .....	9- 4-48/10- 2-48	93.00

Unit	Tenant	Period of Occupancy	Chg. for Period
15	A. Drasgulis and B. Lyons	10- 2-48/ 1-15-49	375.00
16	A. Joseph	9- 9-48/ 9-22-48	32.50
16	B. Liebel and M. Nick	9-22-48/ 9-25-48	7.50
16	F. L. Evans	9-25-48/10- 1-48	15.00
16	E. L. Cheshier	9-28-48/12- 6-48	170.50
16	S. Bakke	12- 9-48/ 1- 8-49	75.00
17	S. Carrithers	9- 9-48/ 9-23-48	36.00
17	F. W. Riass	9-22-48/10- 6-48	35.00
17	B. Riddes	10- 5-48/ 1- 9-49	240.00

### III.

That on June 3, 1943, an Order was made and entered by the Rent Director of the Office of Price Administration fixing and establishing rental for the various units within the accommodation located at 1535 Bellevue Avenue in the city of Seattle, Washington, at the rates per month set forth hereunder under Column "A." That such rentals so set by such Order were not thereafter changed or adjusted until an Order issued May 18, 1949, effective January 17, 1949, by the Office of Housing Expediter was made and these latter rentals so fixed and established and hereunder listed under Column "B."

Unit	Column "A"	Column "B"
1.....	\$22.00 per month	\$55.00 per month
3.....	22.50 per month	56.00 per month
4.....	22.50 per month	56.00 per month
5.....	27.00 per month	63.50 per month
6.....	27.50 per month	64.00 per month
7.....	22.50 per month	56.00 per month
8.....	22.50 per month	56.00 per month
9.....	25.00 per month	59.50 per month
10.....	23.00 per month	56.50 per month
11.....	21.50 per month	55.00 per month
12.....	23.50 per month	57.00 per month
14.....	30.50 per month	67.00 per month
15.....	26.00 per month	62.50 per month
16.....	20.50 per month	54.00 per month
17.....	22.50 per month	56.00 per month

## IV.

That the reason for the Order heretofore referred to as being effective January 17, 1949, was because of the substantial addition to such accommodations of various services, equipment and improvements, which the tenants listed in Finding No. II enjoyed during their term of occupancy.

## V.

That the structure located at 1535 Bellevue Avenue, Seattle, Washington, is not and has not been a hotel in the community, nor is it nor has it been known as such within such community, nor were additional housing accommodations created by conversion.

## VI.

That in collecting the rentals for the various units set forth in Findings of Fact No. II up to about the 15th of January, 1949, the defendant acted in good faith in the honest assumption that the accommodation he was operating was not subject to rent control under the Housing and Rent Act, and from these Findings of Fact the Court makes the following

## Conclusions of Law

1. That Tighe E. Woods, as Housing Expediter, Office of Housing Expediter, is entitled to maintain this action and jurisdiction is conferred upon this Court by Sec. 206(b) of the Housing and Rent Act of 1947, as amended.

2. That the structure located at 1535 Bellevue Avenue in the city of Seattle, Washington, is a controlled housing within the meaning of the Housing and Rent Act of 1947 as amended.

3. However, that because the tenants enjoyed the services, equipment and improvements during their term as tenants, for which the increased rental allowance made by the Order effective January 17, 1949, was granted, in the exercise of the sound discretion of the Court the determination of any restitution due justly and fairly should be predicated on such Order rather than the maximum rent technically in effect during the period of occupancy of such tenants.

4. That because the tenants were permitted to remain in possession for short and odd terms of occupancy without being expected to or paying rentals for a full monthly period, and this condition constituted both a service to the tenant and a burden on the landlord, and in view of the fact that prior to about January 17, 1949, the landlord in making the rental charges that he did, was acting in good faith, in the sound discretion of the Court and for the purpose of determining the amount of restitution due, the difference between the amount of the rental charged and the amount established by the Order effective January 17, 1949, should be the measure of restitution if the occupancy of the tenant constituted one or more months, plus the rate of  $1\frac{1}{2}$  times the monthly rate if the occupancy of the tenant constituted one or more weeks, in addition

to such months; provided that in no case should the weekly rate for a period less than a month exceed the monthly rental, plus a rate of twice the monthly rate if the occupancy of the tenant constituted one or more days in addition to such months and weeks, but provided that in no case that the daily rate should exceed the weekly rate for a period less than a week, nor should the daily and weekly rate combined exceed the monthly rate. That if the period of occupancy of the tenant was for less than a month, then the measure of restitution should be computed at the same rate as the period in excess of the month is computed for a tenant renting for a month plus additional weeks or days as heretofore set forth. Nothing in this Conclusion, however, is intended to authorize the defendant herein to retain rentals in excess of the proportionate monthly rate based upon the Order of January 17, 1949, after such date, regardless of the term that any tenant may have occupied any unit within the concerned accommodation thereafter.

Let Judgment for Injunction and Restitution be entered accordingly.

Done in open court this 20th day of January, 1950.

/s/ LLOYD L. BLACK,

United States District Judge.

Presented by:

/s/ C. E. KNOWLTON, JR.,

Attorney for Plaintiff.

[Endorsed]: Filed Jan. 20, 1950.



In the District Court of the United States for the  
Western District of Washington, Northern  
Division

No. 2201

TIGHE E. WOODS, Housing Expediter, OFFICE  
OF THE HOUSING EXPEDITER,

Plaintiff,

vs.

MIKE J. FEELEY,

Defendant.

### JUDGMENT

The Court having entered its Findings of Fact and Conclusions of Law herein and being fully advised in the premises, Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed that the defendant, Mike J. Feeley, together with his agents and servants, be restrained and enjoined from demanding or receiving rentals for any of the units within the accommodation located at 1535 Bellevue Avenue, Seattle, Washington, in excess of the otherwise maximum rentals as established pursuant to the said Housing and Rent Act of 1947, as amended.

It is the further Judgment and Order of this Court that the defendant, Mike J. Feeley, shall forthwith pay into the registry of the Court, by paying to the Clerk thereof, the total sum of \$1,-498.31, such sum representing the amount which this

Court has found the defendant has charged his various tenants in excess of the otherwise maximum rentals as established under the Housing and Rent Act of 1947, as amended, for the period from September 1, 1948, until on or about January 17, 1949, for the use and occupancy of the various units within the accommodation located at 1535 Bellevue Avenue, Seattle, Washington, and which this Court has further found in the exercise of its equitable discretion to be the proper measure of restitution in this case.

It Is Further Ordered that the several persons hereinafter named, upon filing written application therefor with the Clerk of this Court, requesting the respective sums following their names, be paid to them out of the total of \$1,498.31 paid into the clerk by the said defendant and upon order of the court acting upon such application shall be entitled to receive from the said Clerk such sum, to wit:

A. Joseph	\$43.00	R. E. Best	\$20.04
J. Harvey	103.49	E. L. Cheshier	38.04
T. Smith	85.90	D. W. Huest	38.96
R. Buckholtz	62.14	C. E. Mintz	11.00
J. McGuire )		M. Thompson )	
V. Schultz )	89.66	L. Asplund )	.98
C. Bruhahn )		J. D. Anderson	38.26
Hutton )		D. Young	2.95
Whiteside )	3.02	H. Christenson	93.50
Martell	43.16	F. L. Evans	77.28
J. Fisherman	44.82	Lancaster )	
Gabel )		Hulbert )	41.00
E. Thompson )	72.00	J. Williscroft	30.50
Reese	2.85	A. Drasgulis )	
C. H. Mullen	11.00	B. Lyons )	144.24
W. Ashwell	57.28	S. Bakke	21.00
C. G. Hunter	70.60	Riddes	57.28
D. Dunn )			
M. Sewall )	194.36	Total.....	\$1498.31

It is further ordered that the Plaintiff shall have and recover his taxable costs herein, including filing and Marshal's fees for service in the amount of \$17.72.

Done in open court this 20th day of January, 1950.

/s/ LLOYD L. BLACK,  
United States District Judge.

Presented by:

C. E. KNOWLTON, JR.,  
Attorney, Office of Housing  
Expediter.

[Endorsed]: Filed and entered Jan. 20, 1950.

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In the District Court of the United States for the  
Western District of Washington, Northern  
Division

No. 2201

TIGHE E. WOODS, Housing Expediter, OFFICE  
OF THE HOUSING EXPEDITER,  
Plaintiff,

vs.

MIKE J. FEELEY,

Defendant.

### MOTION FOR NEW TRIAL

The Defendant moves the Court for an Order setting aside the Judgment in favor of the Plaintiff and against the Defendant entered on the 20th day

of January, 1950, and for a new trial on the following grounds:

1. Insufficiency of the evidence to justify the Decision and Judgment in the following particulars:

1. That the Plaintiff had no legal authority to sue on behalf of the tenants.

2. That the accommodations of the Defendant were not subject to control by the Expediter for two reasons:

a. That such accommodations were additional housing accommodations converted from a building which, but for Defendant's promises and assurances to the Fire and Health Departments of the City of Seattle that he would correct the unsafe and unhealthy conditions, would have been condemned and would have remained vacant.

b. That the services furnished by the Defendant to the tenants were more than those given by any hotel, apartment house or rooming house and were those which came within the meaning of a family hotel.

3. Newly discovered evidence material for the Defendant that he could not with reasonable diligence have discovered and produced at the trial which evidence is supported by the Affidavit of Della Foughty hereto attached with evidence is not cumulative and not corroborative of evidence produced at the trial but which evidence if proven at the trial would change the amount of the Judgment

to the benefit of the Defendant. Such evidence will show that the Local Area Expediter had arbitrarily established monthly rates which violated Sec. 204 (b)(1) of the Housing and Rent Act of 1947 as amended and it has become impossible for the Defendant to operate the accommodations.

Dated at Seattle, Washington, this 30th day of January, 1950.

/s/ MARK M. LITCHMAN,  
Attorney for Defendant.

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[Title of District Court and Cause.]

AFFIDAVIT OF DELLA FOUGHTY IN SUP-  
PORT OF DEFENDANT'S MOTION FOR  
NEW TRIAL

State of Washington,  
County of King—ss.

Della Foughty, being first duly sworn on oath deposes and says: that she makes this affidavit in support of Defendant's Motion for a New Trial of the above-entitled case; that she is familiar with the facts to be hereinafter set forth by reason of her employment by the Defendant to check on the income and expenses in the operation of the accommodations located at 1535 Bellevue, Seattle, Washington; that at the time that the Defendant was requested by the Local Area Expediter to apply for the establishment of monthly rates for the said accommodation the accommodation had only been

in operation under the ownership of the Defendant for a little more than four (4) months; that she was the one who prepared the application and at the time she was of the opinion that the total monthly expenses for the operation of said accommodation would not amount to more than the sum of \$748.57. She excluded therefrom allowances for depreciation, repairs, replacements and payments on the principal and interest on the purchase of the building and the furniture although some of the items were mentioned in her statement. At the time the rental income was figured at \$930.50 there was no allowance made for loss and vacancy which last figure was based upon the rates established by the Local Area Expediter. On May 17, 1949, monthly rates were established by the Local Area Expediter and although Affiant and the Defendant knew that they would have a difficult time to maintain the services and make repairs and replacements they didn't realize until after the trial of the case that were it not for the money they received from the commercial rentals, namely \$285.00 per month, that they would not be able to take care of the increasing number of bills which came in which far exceeded the expenses on paper; that when the commercial rentals failed to come in it was then that it dawned upon Affiant that they would not be able to operate the accommodation; that the space that was formerly occupied by commercial tenants has been vacant for several months; that in addition to the above increase of expenses the accommodation has been

damaged as a result of the earthquake which up to date amounts to sixteen or seventeen hundred dollars; that every now and then a new damage appears as a result of the earthquake and that these repairs will have to be made otherwise the building may be condemned by the Building Department. That Affiant knows that the Defendant has fallen behind on his payments on the building to the extent of four months' payments, to wit: the sum of \$1,-600.00 and on the payments for the furniture to the extent of \$2,305.00 and also on the payments for other articles of equipment such as oil burner, hot water tank, refrigerators and ranges. The creditors threaten to foreclose and that unless substantial payments are made by the Defendant they will take possession and in the case of the personal property will no doubt remove the same from the building. That the Affiant knows that it will be impossible to operate the accommodation furnishing the various services on the rates established by the Local Area Expediter; Affiant states that she would be willing to testify and will offer testimony and documents such as bills at a trial to substantiate her statements herein made. Affiant is not an accountant and was not aware of the facts alleged herein pertaining to the increased expenditures until some weeks after the trial when the Defendant asked her where they were going to get the money to continue operating the accommodation. Sec. 204 (b) (1) of the Housing and Rent Act of 1947 as amended requires the Expediter to allow the landlord a fair net operating



income. However, in the establishment of the low monthly rentals it will be impossible for the Defendant to operate said accommodation. All of the statements above-mentioned are not cumulative and are not corroborative of evidence produced at the trial but which evidence if proven at the trial would change the amount of the Judgment to the benefit of the Defendant if the said Defendant is allowed to prove the same and more than that would make it possible for him to operate the accommodations.

/s/ DELLA FOUGHTY,  
Affiant.

Subscribed and Sworn to before me this 30th day of January, 1950.

[Seal] /s/ MARK M. LITCHMAN,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Copy received.

[Endorsed]: Filed Jan. 30, 1950.



In the District Court of the United States for the  
Western District of Washington, Northern  
Division

No. 2201

TIGHE E. WOODS, Housing Expediter, OFFICE  
OF THE HOUSING EXPEDITER,  
Plaintiff,

vs.

MIKE J. FEELEY,

Defendant.

NOTICE OF APPEAL TO CIRCUIT COURT  
OF APPEALS

Notice is hereby given that Mike J. Feeley, the Defendant, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Judgment entered in the above-entitled case on January 20, 1950, in favor of the Plaintiff and against the Defendant for the sum of \$1,498.31 and costs and from all other Rulings and Orders made in the trial of the case and in particular from the Order denying a Motion for a New Trial entered February 10, 1950.

/s/ MARK M. LITCHMAN,  
Attorney for Defendant.

[Endorsed]: Filed April 10, 1950.

[Title of District Court and Cause.]

### COST BOND ON APPEAL

Bond No. 49 S 3801

Know All Men By These Presents:

That we, Mike J. Feeley, and The Aetna Casualty and Surety Company, a Connecticut Corporation of Hartford, Connecticut, are held and firmly bound unto Tighe E. Woods, Housing Expediter—Office of the Housing Expediter, in the sum of Two Hundred Fifty Dollars (\$250.00), lawful money of the United States, to be paid to said Tighe E. Woods, Housing Expediter—Office of the Housing Expediter, his successor or successors, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and each of our successors and assigns by these presents.

Sealed with our seals and dated this 10th day of April, 1950.

Whereas, the above-named Mike J. Feeley has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment, decision, and decree of the U. S. District Court in the above-entitled cause, which decision of the United States District Court was in favor of Tighe E. Woods, Housing Expediter—Office of the Housing Expediter, and against Mike J. Feeley.

Now, Therefore, the condition of this obligation is such that if the above-named Mike J. Feeley shall

prosecute its said appeal to effect and shall pay all costs if the appeal is dismissed or the judgment or decision of the U. S. District Court is affirmed, or such costs as the appellate court may award if the judgment and decision of the U. S. District Court is modified, then this obligation shall be void; otherwise to remain in full force and effect.

/s/ MIKE J. FEELEY,  
Principal.

THE AETNA CASUALTY AND  
SURETY COMPANY.

[Seal] By /s/ J. L. WARME,  
Resident Vice President.

Attest:

/s/ D. H. HOFFMAN,  
Resident Assistant Sec'y.

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[Title District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the above-mentioned Court:

Please transmit to the Clerk of the Court of Appeals for the Ninth Circuit the entire record together with the transcript of the proceedings in the above-entitled case.

/s/ MARK M. LITCHMAN,  
Attorney for Defendant.

Service acknowledged.

[Endorsed]: Filed May 12, 1950.

In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.

No. 2201

TIGHE E. WOODS, Housing Expediter, OFFICE  
OF THE HOUSING EXPEDITER,  
Plaintiff,

vs.

MIKE J. FEELEY,  
Defendant.

STENOGRAPHIC TRANSCRIPT OF  
PROCEEDINGS AT TRIAL

October 1, 1949

Black, Judge.

Appearances:

C. E. KNOWLTON, JR.,  
Attorney at Law, Appearing for and on  
behalf of plaintiff;

MARK M. LITCHMAN,  
Attorney at Law, Appearing for and on  
behalf of defendant.

The Court: The cause of Tighe E. Woods, Hous-  
ing Expediter, plaintiff, versus Mike J. Feeley, de-  
fendant, No. 2201, is called for trial.

Is the plaintiff ready?

Mr. Knowlton: Plaintiff is ready.

The Court: Is the defendant ready?

Mr. Litchman: The defendant is ready.

The Court: You may proceed.

Mr. Knowlton: Counsel have entered into a stipulation as to most of the material facts.

The Court: In writing?

Mr. Knowlton: It is in writing.

The Court: All right. If you will let me read it, I will know a great deal more than I do now.

(Court reads stipulation referred to.)

The Court: Well, what is the issue?

Mr. Litchman: If the Court please, I will further narrow the facts and the law to a point where the matter will be very simple. With reference to the legal points, immediately after the government has rested its case it is my intention to move to dismiss on the ground that the tenants have not given any written authorization to the expediter to bring the suit. If that motion be denied, we will then argue and offer proof to the effect that since August 1948, in line with the amended answer, that Mr. Feeley has been operating this place as an apartment hotel and furnishing services similar to the services rendered by other apartment hotels in the City of Seattle, and also in line with that which the State statute provides as to what constitutes a hotel. Hence under the Federal statute we contend we have a right since we opened the establishment under Section 1892 Title 50, which decontrols housing accommodations in any estab-

lishment which is commonly known as a hotel, and also Section 3-a, that there has been a reconversion and conversion of the housing accommodation. I suppose you would call it a house although I would call it in my own language a flop house. That is really what it was before we took over.

And we want to show that he is operating now as a hotel and giving the same kind of service as do other hotels in the City of Seattle, and I think it is admitted by the stipulation that it was about to be condemned by both the Health Department and the Fire Department. By promising to get rid of the rats and make the necessary improvements——

The Court: In other words, your position is that Mr. Feeley should pay nothing?

Mr. Litchman: That is correct, Your Honor.

The Court: And it is your further position that even if he should pay something that this plaintiff is not authorized to collect it?

Mr. Litchman: That is right.

The Court: Now, what is your position, Mr. Knowlton? How much are you now asking for?

Mr. Knowlton: If your Honor please, I suppose you understand the stipulation?

The Court: I have read it.

Mr. Knowlton: I would like to point out——

The Court: I am now asking you how much you think you should get judgment for?

Mr. Knowlton: We feel this subsequent order that was not issued or was not effective until January of this year, and this overcharge occurred prior

to that time,—was because he had increased his services a lot more than he had——

The Court: How long has he been giving these extra services?

Mr. Knowlton: All the tenants named in this schedule received the services during the entire period of the occupancy.

The Court: May I speak off the record?

(Both counsel assent to a discussion off the record.)

The Court: Mr. Litchman, suppose you make your motion without argument, and I will take it under advisement and let you put in evidence without waiving your position.

Mr. Litchman: At this time I move the Court that the case of Woods, Expediter, against the defendant Mike Feeley be dismissed on the ground and for the reason that there is no allegation in the complaint and there is no evidence introduced and there is nothing in the stipulation to indicate in any way that there has been any written authorization on the part of any tenants to the expediter to bring the suit or any other suit on behalf of any of the tenants.

The Court: Well, I will ask the government, do you have written authorization to bring this suit from the tenants?

Mr. Knowlton: I think we may have several complaints, but I don't contend we have written authorization for any substantial number of tenants.

Mr. Knowlton: I may have, but I consider that fact immaterial.

The Court: All right. I will take the motion under advisement and allow the defendant to put in evidence as to the character of the accommodations without waiver of such rights as he may have by reason of the fact that the plaintiff is not authorized to bring the suit for the different tenants or some of them.

Ruling reserved.

### DELLA FOUGHTY

being first duly sworn, testified on behalf of defendant as follows:

#### Direct Examination

By Mr. Litchman:

Q. Will you state your full name, please?

A. Della Foughty.

Q. Where do you live, Mrs. Foughty?

A. At 1515 Belmont.

Q. Do you know the defendant, Mr. Feeley?

A. Yes.

Q. Are you employed by Mr. Feeley?

A. Yes.

Q. How long have you been employed by Mr. Feeley?      A. A little over five years.

Q. What do your duties consist of?

A. Well, as secretary, and taking care of his business.

The Court: What?



(Testimony of Della Foughty.)

The Witness: Taking care of his business.

Q. Have you had any experience as a hotel keeper and apartment house operator, and so on?

A. Yes.

Q. Where? A. Seattle.

Q. What did you operate?

A. I operated the Wilshire Hotel.

Q. That is located in Seattle? A. Yes.

Q. How big a place is that? A. 132 rooms.

The Court: Where is it?

The Witness: 1934 Seventh Avenue.

The Court: Proceed.

Q. Are you familiar with the services rendered by Mr. Feeley in the operation of this apartment building located at 1535 Belmont?

A. Yes.

Q. Is that Belmont? A. Bellevue.

Q. Just tell the Court what kind of services are rendered to the tenants in that apartment building?

A. Well, they get all the services: daily maid service, linen, everything a hotel gives; even more than a hotel; they have dishes and utensils.

The Court: All that a hotel gives and more? What is more?

The Witness: They give all the dishes and silverware and everything that they can use except the food.

Q. How big a place is this?

A. Seventeen units.

The Court: Seventeen rooms?

(Testimony of Della Foughty.)

The Witness: Seventeen units.

Q. In other words, you have seventeen tenants?

A. Yes.

Q. What kind of services are offered by apartment hotels in the City of Seattle, do you know?

A. Yes, they have service similar to ours except they give weekly maid service and we give daily maid service.

Q. I will ask you at the time you commenced operations did you have a register for the occupants? A. Yes.

(Hotel register marked Defendant's Exhibit A for identification.)

Q. Handing you what has been marked Defendant's Exhibit A for identification, what is that book? A. Hotel register.

Q. Was that the register that was used when you opened up the Feeley Apartment Hotel?

A. Yes.

Mr. Litchman: I offer this in evidence.

Mr. Knowlton: When did you start using this?

The Witness: When we started the hotel.

Mr. Knowlton: I asked you when? What date?

The Witness: It was around the end of August.

The Court: Of what year?

The Witness: 1948.

The Court: Not before?

The Witness: No, we did not operate the place before that date.

Mr. Knowlton: I have no objection except it is

(Testimony of Della Foughty.)

immaterial, what they were using in September, 1948, if they were not using a register in June, 1947.

The Court: Overruled. Exhibit A admitted.

(Hotel register previously marked Defendant's Exhibit A for identification, received in evidence.)

Q. Now, was this establishment closed at any time prior to the time it opened up as an apartment hotel? A. Yes, around two months.

Q. You do not furnish bell boy service at all, do you? A. No.

Q. And do apartment hotels, hotels where they have only seventeen units or seventeen occupants—do they furnish bell boy service?

A. No, there is really no need for it.

Mr. Litchman: I have here, if the Court cares to have it—I don't want to clutter up the record with a lot of statements showing what is furnished because I think the stipulation shows. I don't think there is anything else that has any bearing on the case except that I can submit this if Your Honor wants to see just what is in each unit, a list of dishes, furniture, silverware, and so on and so forth, if Your Honor cares to have it.

The Court: All right. I say all right. You have notified me you have such. I am not making any request.

Mr. Litchman: I don't know whether you wanted it or not.

(Testimony of Della Foughty.)

The Court: It is for the parties to decide what evidence they shall offer.

Mr. Litchman: It is in the stipulation that all these services are furnished, but I thought you might want to see it. I don't want to clutter up the record with a lot of unnecessary stuff.

### Cross-Examination

By Mr. Knowlton:

Q. Do you have a hotel desk in this accommodation? A. Yes.

Q. Where is it?

A. Right inside the door in the manager's apartment.

Q. Do you have elevator service?

A. We have only two floors. We don't need an elevator.

Q. What kind of telephone service do you provide the guests or tenants?

A. We give telephone service.

Q. Do you have a switchboard?

A. No switchboard, no. We call them.

Q. Do you have a buzzer system?

A. No, it is not necessary.

Q. Would you explain exactly what you do have?

A. We keep someone there to answer the phone and call the tenants to the phone.

Q. In other words, you have a phone in the manager's office, and if someone desires to get them, the tenants, they are called to the manager's office?

(Testimony of Della Foughty.)

Someone in the manager's office goes out and notifies the tenant there is a telephone call?

A. No, we have phones in each hallway.

Q. Are they pay telephones? A. Yes.

Q. Does that mean you have phones on each floor? A. Yes.

Q. There is no individual telephone service in the individual units, is that correct? A. No.

Q. Is there any lobby in this structure?

A. A small lobby, yes.

Q. Where is that located?

A. On the ground floor.

Q. Do you have to go up steps to get to the hotel rooms? A. Yes.

Q. The lobby or sitting room is on the ground floor? A. Yes.

Q. But there is nothing there except a place to sit down? A. That is right; a small lobby.

Q. Are you familiar with the operation of this place prior to August or September, 1948?

A. I am familiar with the building, yes.

Q. How long have you been familiar with it?

A. Oh, I would say about six months prior to that time.

Q. Were you familiar with the operation during the six months prior to September, 1948?

A. In what way do you mean familiar?

Q. Do you know what happened? Do you know what services were provided?

A. Yes, I do. There were no services.

(Testimony of Della Foughty.)

Q. By the way—the individual units are all self-contained units, that is, have kitchen and bath?

A. Yes.

Q. Every unit has its own kitchen?

A. Yes.

Q. And every unit has its own bathroom?

A. Yes.

Q. There is no such thing as a single room accommodation—that is, sleeping rooms only?

A. No.

Q. You stated there were no services of any kind given to the guests before September or August of 1948?

A. No, they didn't even have hot water.

The Court: Mr. Knowlton, you say the month of September and she says the month of August. You mean in August when you operated and before September there was no hot water?

The Witness: When we took the building over. We purchased the building in June.

Q. There were no tenants there when you purchased the building? There were no tenants in the various units? A. Yes.

Q. What did you do about those tenants?

A. We gave them sixty days' notice to vacate.

Q. Based on what ground?

A. To fix the building up and redecorate it. It could not be done with the tenants in the building. They all knew it.

Q. When you fixed it up you did not change the number of units?

(Testimony of Della Foughty.)

A. No, we intended to, but we ran out of money.

Q. In other words, the apartments are there in the same place?      A. Yes.

Q. And, actually, you fixed up the apartments and furnished them, but the same apartments are there as before?      A. Yes.

Q. The same number of apartments?

A. Yes.

Q. So no additional housing accommodations were created at all by your fixing it up and rehabilitating it?

Mr. Litchman: I object to that. That is a conclusion for Your Honor to draw from the facts.

The Court: Overruled.

Mr. Litchman: If the Court please, I think the witness probably can't answer the question properly until it is explained to her what is meant by additional accommodations.

The Court: You may say additional rooms.

Mr. Litchman: It has already been made plain to the Court that there are no additional rooms.

Mr. Knowlton: That is right.

Mr. Litchman: And that the set-up is the same, so far as the physical set-up is concerned. If the Court understands from the stipulation that the quality of the accommodations is better and that there were additional services rendered and the accommodations were redecorated and repaired, but not structural changes made.

The Court: All right.

(Testimony of Della Foughty.)

Q. Now, when you opened up in August or September of 1948——

The Court: Just a moment. Now let's find out the date it opened up.

The Witness: We started renting in late August, but I don't think there was any ready until the early part of September.

Q. You first gave occupancy in September, 1948, is that correct?      A. Yes.

Q. But you collected some rent in late August, is that correct?      A. Yes.

Q. Then when you actually gave occupancy in September and put up a sign saying "Feeley Apartment Hotel"—where did you get your prices that you charged the various guests or tenants?

A. We gauged them by others giving the same service in hotels.

Q. Without regard to what the prices were for the accommodations before that date, is that correct?

A. Yes, they were so ridiculously low that the man who had the building then was going broke.

Q. And you didn't make any application or inquiry of the Office of Housing Expediter as to whether you were controlled or decontrolled?

A. We did not think it was necessary.

Q. Why didn't you think it was necessary?

A. We figured we were decontrolled.

Q. Who told you that?

Mr. Litchman: Oh, I object to that.



(Testimony of Della Foughty.)

A. I don't remember.

Q. You then decided you were decontrolled, is that correct?

A. Yes, or we would not have gotten in this mess, if we hadn't thought we were.

Redirect Examination

By Mr. Litchman:

Q. Mrs. Foughty, do you know of any apartment hotels where you have to walk upstairs in order to register in the City of Seattle?

A. Many, yes.

Q. Can you mention any one in particular?

A. The place?

Q. Yes, one hotel

A. The Glen Hotel and the Forest Hotel. I can name dozens. And the Texan Hotel.

Q. There is one right next to the hotel at Fourth and Spring. I noticed it as I went by there. What is the name of that hotel at Fourth and Spring—between Spring and Seneca, right next to the Hungerford?

A. I don't know the name of that. I know the one you mean. Many small hotels do not have a lobby.

Mr. Litchman: That is all.

Mr. Knowlton: That is all.

(Witness excused.)

Mr. Litchman: It is our position we come within

the two provisions, as I said before. One is the one you have already read.

The Court: Have you finished?

Mr. Litchman: Yes.

The Court: Any evidence for the government?

Mr. Knowlton: No.

The Court: Both sides rest?

Mr. Knowlton: Yes.

Mr. Litchman: And the other is 1892, and Section 3-a.

The Court: My own idea is that the most valuable assistance to me will be to see this property. Is there any reason we can't go right up?

Mr. Litchman: No.

Mr. Knowlton: No.

The Court: Is it agreed I can go up and that anything said up there is off the record?

Mr. Litchman: Yes.

Mr. Knowlton: Yes.

The Court: It is stipulated between counsel that it is unnecessary for the Court Reporter to be present and that whatever is said is off the record and not binding on any one? Is that correct?

Mr. Knowlton: That is correct.

Mr. Litchman: Yes, Your Honor.

The Court: Any statements made will be informal statements. If there is any desire to supplement by evidence the evidence that has already been heard, the parties will have to ask to reopen and put in such evidence. The Court will view the premises so that it can better understand the evidence

presented and can judge whether or not the premises are in agreement with the evidence presented. Is that satisfactory?

Mr. Litchman: Satisfactory to me.

Mr. Knowlton: Yes.

(Court, respective counsel, and defendant depart for inspection of premises in question.)

### Continuation of Proceedings

#### All Parties Present

October 14, 1949

Mr. Litchman: Our position is, as I said before, that the plaintiff has no written authorization from any tenant to bring this suit in his behalf, and the statute gives to every tenant the right to bring a suit for violation, so to speak, of the contract or breach of contract.

In other words——

The Court: Does the statute say that the Expediter has to have written authority in order to bring a suit?

Mr. Litchman: No, it does not. There is no right given to the Expediter to bring any suit for——

The Court: Let me ask one thing more. Have there been any decisions supporting your view?

Mr. Litchman: I don't think the point has ever been raised.

The Court: I am first asking if there are any decisions supporting your view.

Mr. Litchman: I have asked counsel if there are any against him.

The Court: I am asking if there are any in your favor?

Mr. Litchman: I can find any number of decisions holding—not particularly the Expediter, but a person cannot bring a suit for another person——

The Court: No, I am not asking that. I am asking if the Expediter has to have written authority of the tenants in order to bring the suit.

Mr. Litchman: I haven't found any cases.

The Court: May the Court speak off the record?

(Each counsel assents to discussion off the record.)

(Discussion off the record.)

The Court: The Court has suggested informally to counsel what the Court feels would be an equitable and proper decision in this case providing the Expediter had authority to bring the action for the tenants within the year in which the tenants could have brought an action for themselves. The Court has suggested that in the event the parties are not able to reach a compromise settlement of the matter, the Court would like from the Expediter within ten days from today a brief upon the right of the Expediter to maintain the action and on such other points as the Expediter would like to urge or consider, the defendant to have fifteen days after receipt of the Expediter's opening brief to answer, and the Expediter to have one week after receipt of defendant's brief for reply. I think so that the Court may be better advised I will continue this

matter until 9:30 o'clock a.m. one week from today, at which time counsel may inform me as to whether or not there has been any compromise agreement.

December 30, 1949

### COURT'S ORAL DECISION

The Court: In the case of Tighe E. Woods, Housing Expediter, plaintiff, versus Mike J. Feeley, defendant, the Court has given serious consideration to the authorities cited, to the evidence produced and also to those facts which the Court learned upon a visit to the premises.

The Expediter commenced this action asking for restitution to the tenants of the difference between the amounts they paid from about August, 1948, to about January 17, 1949, and the amounts which had been authorized previously to be charged as rents for the particular premises but for entirely different accommodations of much less worth.

As of January 17, 1949, there became effective a new schedule of rents based upon the much improved accommodations and much greater services rendered. The previously authorized rent schedule was for apartment units wholly unfurnished in a dilapidated and leaking building with inadequate and defective plumbing. Beginning about August, 1948, and during the period covered the defendant furnished apartment units to tenants, which apartment units had been much improved, the plumbing and lighting being repaired and the walls repaired and redecorated. The roof was repaired. New and

attractive furniture for the units involved was added including new ranges and new refrigerators. Various services including maid service, linen, and towel service were supplied. Certainly there can be no comparison between the proper rental for the apartments and services rendered by the defendant beginning about August, 1948, until January 17, 1949, with the totally inadequate unfurnished apartment units listed under the earlier rent schedule.

The Court finds, however, that the premises were not freed from control. The premises were neither a hotel nor generally considered or reputed as such in the community or neighborhood, but the apartments and services rendered made the tenancy unique in that the tenants were not required to accept the premises on a month-to-month basis, but could obtain them on a daily basis, weekly basis, monthly basis, or on a combination of monthly, weekly, and daily bases. The landlord in good faith believed that he had the right to make the charges he did. He in good faith believed he was freed from rent control. The Court is satisfied that the tenants were as well satisfied with the charges made as tenants in the kind of accommodations offered ever are. The Court is satisfied that most of the tenants were well satisfied with the accommodations offered and the privilege of obtaining same for odd periods.

The Court finds that the Expediter is not entitled to a judgment for restitution of more than the difference between the rents scheduled effective January 17, 1949, and those charged when the tenancy was monthly.

Where weekly occupancy was had a reasonable rental for the defendant to charge was one hundred fifty per cent of the proportionate monthly rate.

Where there was occupancy by the day the reasonable charge for the defendant to make was twice the proportionate monthly rate.

But in no event is the defendant entitled to retain from any single tenant for weekly occupancy more than the price per month under the schedule. And, likewise, in no event is the defendant entitled to retain for daily occupancy where a tenant continued on more than the reasonable weekly rate as now announced. However, where a tenant continued after the expiration of one or more weeks for an odd number of days, a reasonable charge by the defendant would be at the weekly rate I have specified for the week, and at the daily rate as I have specified for the odd days, with the limitation that there shall be no excess charge for the portion of a month over the monthly rate as previously mentioned nor for any odd days of a week exceeding the weekly rates I have specified.

The intention is that the defendant may receive and properly retain the weekly and monthly rentals as I have stated for the period plus the odd weeks and odd days over a month or months or week or weeks, with the specific provision that any fractional part of a month or week shall not exceed the monthly or weekly rate now specified.

The plaintiff is entitled to have an order or judgment requiring restitution to the tenants of the



amounts in excess of the monthly, weekly, and daily rates I have earlier in this oral opinion set forth.

Nothing is intended in this opinion to authorize the defendant's retaining rents for portions of a month or week after January 17, 1949, in excess of the proportionate monthly rental authorized by the Housing Expediter effective January 17, 1949. But before January 17, 1949, and after or beginning with August, 1948, the landlord in good faith believed that he was entitled to charge reasonable rates on a daily or weekly basis for tenancies. It appears to me that for such period it would be unreasonable to require the landlord to return all charges for daily and weekly services which exceeded the proportionate amount merely of the monthly schedule. Certainly, a landlord who furnishes four different tenants accommodations one week apiece is entitled to greater remuneration than a landlord who furnishes similar accommodations to a month-to-month tenant who under the law, at least, is required to give the requisite notice of termination of tenancy. In an even greater degree a landlord who furnishes tenants with daily accommodations is entitled to a greater proportionate return than merely that reasonable for a month-to-month tenancy. It was a great privilege to the tenants to be able to occupy these premises a number of days or a number of weeks as they wished, and it was a great privilege to them to be able to leave the premises as they chose at odd days or weeks before or after the termination of a month.



The defendant is required to make restitution in accordance with this ruling by payments to the Clerk of this Court, which are to be in turn paid by him to the tenants on application by them satisfactory to the Court, such payments by the Clerk to the tenants to be made, of course, upon Court order.

I think I have sufficiently covered the situation to make it clear to counsel. The Court fixes Monday, the 16th of January, 1950, as the time for presentation of findings, conclusions, and decree.

Mr. Knowlton: Does Your Honor make any provision for injunction?

The Court: The injunction prayed for will issue, which injunction will be subject to such modification as may be made in the rental schedule by the plaintiff, by the courts, or by other appropriate authorities, and the injunction will be subject to the further order of the Court.

Thank you, gentlemen.

February 10, 1950

## ARGUMENT OF MOTION FOR NEW TRIAL

The Court: Counsel have tried this matter. To a large degree it was tried before the trial. There were many matters presented to me. I tried it. I viewed the premises. It was argued at length repeatedly, both orally and by briefs. Continuances were granted for the briefs. I entered a decision. I think the decision is proper. As a matter of fact, in some respects it is far more favorable to your client, Mr. Litchman, than any decision that you could have

cited to me as a precedent. In other words, I have the idea that my decision was the first one that gave to a tenant the benefit during a period when one schedule was in effect of a rent schedule that later took effect for a subsequent period. I don't think Mr. Knowlton has known of that having happened before in favor of a landlord. I think I was right. I gave careful consideration to this.

Now, there are some things that must be considered, and they must be considered in respect to the whole theory of rent control. Where an individual bought in good faith, without realizing at all the possibility of rent control, an apartment house in 1939 or 1940 and then from then up until now has been confronted with his rents being regulated by someone who perhaps did not know many of the things he ought to know to regulate the rents, there may be much merit in the complaints of such an individual against rent control. His income is regulated and bound and restricted while there is no control at all of his expenditures. His repairs and his taxes cost much more. Not only have his repairs cost much more, but they have not been nearly as good. Everything that he has bought with such portion of the income received, if any, over his expenses has cost much more. Such one can complain that food is certainly as necessary as rent, but there is no control over the people who establish prices for his food.

But this defendant was not such an individual. By your own statement, long after rent control was an established fact, he chose to buy this building.

He chose to contend with whatever hazards there were of rent control. He does not have the same right to feel burdened as that individual who bought before there was rent control and who has to pay more for everything he gets but receives less in rent than perhaps he should.

Now, you have made two substantial points. One is that because the building he bought was in bad repair before he repaired it that it is freed from control. If the Court were to establish the principle that whenever premises had gotten badly in repair and the landlord or owner did not repair them, then he could be freed from rent control by repairing his property, the Court would establish a most dangerous precedent. The Court would advise anyone who owned property that if they just disregarded the welfare of the tenants by allowing the roof to leak and the furnace to get out of repair so that the building would be condemned that then they could be freed from rent control and get a reward for having disregarded the welfare of the occupants of the building.

Just as soon as I follow your argument here in that respect I have to apply it to other people. I think if you were on the other side of the argument you could recognize the fallacy of such a holding.

Now, the second contention is that I am now, after the case has been tried and judgment has been entered, to go back and allow your client to put in evidence what he should have put in, if he had the right to put it in at all, long ago. Your excuse is that he did not know about it. Of course, the period

I am confronted with is the period of time from about August, 1948, to January, 1949. Whatever expenses he had by virtue of the earthquake of April, 1949, is immaterial as far as I am concerned. The fact that he lost and did not have part of his building in October, 1949, is again something I cannot take heed of. Were I to follow your suggestions in that respect, no case would ever be finished. The next time you win a judgment you will be anxious that the judgment that you win is final. I realize that everyone who loses a case is always willing that the case be tried over again because he may not be hurt any worse than before and he may win. Actually, you might be hurt worse. Perhaps I gave your defendant a more favorable decision than your defendant deserved. Actually, I think I gave the defendant just exactly what he deserved under the evidence and under the law. Further than that, I doubt very much that this Court in this kind of an action can be a forum to be the reviewing authority over the correctness of the rental schedules by the Housing Expediter. I am satisfied that if you will read the law itself you will have grave doubts of any such authority on my part. But even if I had the authority, that question should be presented to me timely. The landlord knew or should have known long before this trial that the rent schedule put in effect months before was insufficient. I gave as much time and consideration to this case as I could properly give in view of my obligations to other litigation. When the Court has only so much time and so many cases for consideration, it can give to

each only the amount that allows fair consideration of others.

I decided this case as well as I could. I hope I was right. What I have said now might indicate that I have no appreciation of the difficulties of your client. I sympathize with him, but I can't translate that sympathy into an abandonment of legal principles.

The motion for new trial is denied.

If the rent schedule effective in January, 1949, for the period succeeding the period involved in this action is too low, counsel should take appropriate steps in the appropriate forum at the proper time. But I have no authority in this case to say what the rent schedule shall now be because the only thing before me was what were proper rents in the period before the present rent schedule became effective.

Motion for new trial denied. Exception allowed.

#### Certificate

I, James R. Royse, do hereby certify that I am official court reporter for the above-entitled Court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above Transcript is a true and correct record of the matters as therein set forth.

/s/ JAMES R. ROYSE,

Official Court Reporter.

[Endorsed]: Filed May 10, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO RECORD ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled court, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, and designation of counsel, I am transmitting herewith all the original papers in the file dealing with the above-entitled action or proceeding, including the Court Reporter's transcript of the testimony and proceedings at the trial, together with Defendant's exhibit A, the same being the complete record on file in said cause. The papers herewith transmitted constitute the record on appeal from the judgment filed and entered January 20, 1950, to the United States Court of Appeals at San Francisco, California, and are identified as follows:

1. Complaint.
2. Praecipe for summons.
3. Summons with Marshal's Return thereon.
4. Answer of Defendant.
5. Amended Answer of Defendant.
6. Stipulation of Facts.
7. Plaintiff's Brief.
8. Defendant's Answering Brief.

9. Plaintiff's Reply Brief.
10. Defendant's Objections to Plaintiff's Proposed Findings of Fact and Conclusions of Law.
11. Defendant's Proposed Findings of Fact and Conclusions of Law.
12. Findings of Fact and Conclusions of Law.
13. Judgment.
14. Motion for New Trial.
15. Defendant's Notice of Appeal to Circuit Court of Appeals.
16. Defendant's Cost Bond on Appeal.
17. Court Reporter's Transcript of Proceedings at Trial.
18. Designation of Record on Appeal.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said district court at Seattle, this 12th day of May, 1950.

MILLARD P. THOMAS,  
Clerk.

[Seal] By /s/ TRUMAN EGGER,  
Chief Deputy.



[Endorsed]: No. 12549. United States Court of Appeals for the Ninth Circuit. Mike J. Feeley, Appellant vs. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: May 17, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 12549

MIKE J. FEELEY,

Appellant,

vs.

TIGHE E. WOODS, Housing Expediter, Office of  
the Housing Expediter,

Appellee.

#### APPELLANT'S STATEMENT OF POINTS

Appellant sets forth the following points on which he intends to rely on Appeal for reversal of the Judgment of the District Court and the Order denying New Trial:



1. The Plaintiff had no Statutory or Legal authority to sue on behalf of the tenants.

2. The accommodations of the Defendant were not subject to control by the Expediter:

a. because they were additional housing accommodations converted from a building about to be condemned; and

b. because of the services furnished which were those rendered by a family hotel.

3. Refusing to grant a New Trial because of newly discovered evidence which will show that the rates established by the Local Area Expediter were arbitrarily established and in violation of Section 204(b) (1) of the Housing and Rent Act of 1947 as Amended.

/s/ MARK M. LITCHMAN,  
Attorney for Appellant.

Service admitted.

[Endorsed]: Filed June 2, 1950.

In the United States Court of Appeals  
for the Ninth Circuit

No. 12549

MIKE J. FEELEY,

Appellant,

vs.

TIGHE E. WOODS, Housing Expediter, etc.,

Appellee.

APPELLANT'S DESIGNATION OF RECORD

The Appellant hereby designates the following documents to be printed in the Record on Appeal:

1. Complaint, excepting the Exhibit known as Exhibit "A" attached thereto.
2. Answer of Defendant.
3. Stipulation.
4. Findings of Fact and Conclusions of Law and Judgment.
5. Motion for New Trial and Affidavits in support of same.
6. Reporter's Transcript of Testimony.
7. Notice of Appeal.
8. Appeal Bond.
9. Designation of Points.
10. This Designation of Record.
11. Clerk's Certificate.

/s/ MARK M. LITCHMAN,  
Attorney for Appellant.

Service admitted.

[Endorsed]: Filed June 2, 1950.

No. 12549

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**MIKE J. FEELEY, APPELLANT**

*v.*

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE  
HOUSING EXPEDITER, APPELLEE**

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**APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN  
DISTRICT OF WASHINGTON, NORTHERN DIVISION**

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**BRIEF FOR APPELLEE**

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**ED DUPREE,**

*General Counsel,*

**LEON J. LIBEU,**

*Assistant General Counsel,*

**FRANCIS X. RILEY,**

**BENJAMIN FREIDSON,**

*Special Litigation Attorneys.*

*Office of the Housing Expediter, Washington 25, D. C.*

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FILED

SEP 11 1950

PAUL D. BIEREN

CLERK



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**In the United States Court of Appeals  
for the Ninth Circuit**

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No. 12549

**MIKE J. FEELEY, APPELLANT**

*v.*

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE  
HOUSING EXPEDITER, APPELLEE**

---

*APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN  
DISTRICT OF WASHINGTON, NORTHERN DIVISION*

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**BRIEF FOR APPELLEE**

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**STATEMENT OF JURISDICTION**

Appellant, defendant below, appeals from a judgment entered on January 20, 1950, by the United States District Court for the Western District of Washington, Northern Division, granting to appellee an injunction and directing restitution of rent overcharges (and from an order entered February 10, 1950, denying a motion for a new trial), pursuant to Section 206 (b) of the Housing and Rent Act of 1947, as amended (50 U. S. C. A. 1881 et seq.) (R. 2) Notice of Appeal was filed on April 10, 1950. Jurisdiction of this Court is invoked pursuant to Section 1291 of the Judicial Code (28 U. S. C. A. 1291).

## STATUTES AND REGULATIONS

Applicable sections of the Housing and Rent Act of 1947, and its two annual Amendments (61 Stat. 193; 62 Stat. 93; and 63 Stat. 18; 50 U. S. C. A. 1881 et seq.), and of the Controlled Housing Rent Regulation (12 F. R. 4331; 13 F. R. 1861; 14 F. R. 1671; and 14 F. R. 2233) appear in full in the Appendix, pp. 48 to 59.

## COUNTERSTATEMENT OF FACTS

The facts in this case are for the most part stipulated and, in any event, are not in dispute.

As set forth in the Stipulation (R. 10-13), the premises in question, located at 1535 Bellevue Avenue, Seattle, Washington, were operated as an apartment house prior to June 1948. On June 5, 1948, the tenants were evicted in order to make repairs and improvements in the property and the building was thereafter reopened for occupancy on September 1, 1948. The work done consisted of redecoration, cleaning, general rehabilitation, and a new roof, but no structural changes were made and the same units existed in the same space. Services not previously furnished (maid service, bedding, linen and laundering of linen, lights, cooking fuel, dishes and utensils) were made available and an awning bearing the name "Feeley's Apartment Hotel" was installed. Between some time prior to June 30, 1947, and until September 1, 1948, the establishment was known and operated as a "low class apartment house accommodation."

Both before and after September 1, 1948, the establishment had 17 units and 17 tenants (R. 40, 45).

The 17 units were, and are, each self-contained, with private kitchen and bath; no single room or sleeping-room accommodations were ever offered (R. 44). Since reopening, neither bell-boy nor telephone switch-board service has been rendered (R. 41, 42).

Although maximum rents were in effect for the units at the time of reopening (R. 10-11, 15) and defendant did not make inquiry of the Office of the Housing Expediter as to the controlled or decontrolled status<sup>1</sup> of the accommodations as renovated (R. 46), the new rentals charged bore no relationship to those theretofore established under the Act and applicable Regulation (R. 46).<sup>2</sup>

On February 20, 1949, suit was filed by the Expediter in the United States District Court, Western District of Washington, Northern Division (No. 2201) seeking restitution<sup>3</sup> to the tenants of overcharges and injunctive relief. Defendant's Amended Answer (R. 8-9) consists of a general denial to the allegations of the Complaint and the assertion that "he is entitled to continue operating the said premises as an

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<sup>1</sup> Section 202 (c) (1) of the Act provides that hotels are exempted from the definition of the term "controlled housing accommodations" (*infra*, p. 48).

<sup>2</sup> The Stipulation recites that there is no dispute as to amounts of rent collected, the period of time for which collected, the persons from whom collected, the orders which established the maximum rents, and the fact that all authorized increases in maximum rents were based upon improvements and increases in service (R. 10-12).

<sup>3</sup> The measure of overcharges initially requested in the Complaint was based upon the order of June 3, 1943, establishing maximum rents. Upon issuance of the rental adjustment order of May 18, 1949, the Expediter substantially reduced the amount of claimed overcharges (see List No. 2, R. 15).

apartment-hotel without being required to charge the rate required under the 'Housing and Rent Act' of 1947 or 1948" (R. 9). At the trial, defendant specified the defenses to the action as (1) dismissal of the action was required since the tenants had not given written authorization to the Expediter to bring suit, (2) the establishment was a hotel within the meaning of Section 202 (c) (1) of the Act and therefore exempt from rent control, and (3) additional housing accommodations were created by conversion after February 1, 1947, within the meaning of Section 202 (c) (3) (A),<sup>4</sup> resulting in decontrol. At the trial, the evidence consisted of the Stipulation (R. 10-13) and the testimony of one witness presented by defendant (R. 38); the trial court also made a personal inspection of the subject premises (R. 48, 55). After these proceedings, the trial court gave its oral opinion (R. 51-55), followed by Findings of Fact and Conclusions of Law (R. 17-22) which rejected defendant's claim to decontrol, and Judgment ordering restitution to the several tenants in the sum of \$1,498.31 and enjoining demand and receipt of rents higher than those established under the Act. De-

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<sup>4</sup>Section 202 (c) (3) (A) of the Act provides as follows: "(3) any housing accommodations (A) the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall remain in full force and effect."

defendant's Motion for a New Trial (R. 25)<sup>5</sup> was denied on February 20, 1950 (R. 59) and Notice of Appeal was filed April 10, 1950 (R. 31).

## ARGUMENT

### I

**There is no merit in the contention that repairs made to the premises in question "created new or additional housing"**

1. In his first assignment of error, appellant argues that he "created new or additional housing" (Br. 8). The short answer to this contention is that the appellant stipulated at trial that "the same units in the same space existed upon reopening as existed prior thereto" (Par. 10, R. 13). Since he admitted in the Court below that no new or additional units were created, it is specious for him to argue the contrary in this Court. Moreover, the Court below found as a fact that no additional housing accommodations were created by conversion (Finding 2, R. 20). Nowhere in appellant's brief is there anything which

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<sup>5</sup> This motion was based, among other grounds, on the fact that the defendant learned subsequent to the trial that he was operating the premises at a loss. According to the affidavit of Miss Foughty, defendant's employee, the loss was incurred through her failure to supply the Office of the Housing Expediter with the proper figures in her application for a "fair net operating income," as provided in Section 204 (b) (1) of said Act (*infra*, p. 52) (R. 28). The Act, nevertheless, and the Regulations issued pursuant thereto (Amendment 92, 14 F. R. 2233), provide for a "fair net operating income" upon application (825.5 (a) (18) (ii)) and further provide for "successive petitions" (825.5 (a) (18) (iii)). If defendant operated at a loss as stated in his motion for a new trial, the fault was his own failure to proceed properly, and not that "the Local Area Expediter had arbitrarily established monthly rates which violated Sec. 204 (b) (1) \* \* \*" (R. 27).

demonstrates or even suggests that the trial court's finding in this respect was so manifestly erroneous that it should be disturbed (Rule 52 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. following Sec. 723c).

It is uncontroverted in the record and, moreover, appellant expressly agrees that the premises in question were on June 1, 1948, and prior thereto operated "as a low class apartment house" (Par. 10, R. 13). Appellant further agrees that from June 5, 1948, to September 1, 1948, the building was vacant and that "the apartments were redecorated, cleaned up and generally rehabilitated" (id.). And finally appellant agrees that "no structural changes were made in the individual units" (id.).

The appellant, pursuant to the Expediter's Controlled Housing Rent Regulation (12 F. R. 4331) has already applied for and obtained a substantial increase in rent (Par. 5, R. 11) based upon these major improvements (*infra*, p. 57). In addition to this substantial increase the appellant was also entitled to an increase, if proper, in order to obtain "a fair net operating income".<sup>6</sup> These provisions are by their very nature complementary and not mutually exclusive, so that an increase under Section 5 (a) (1) of the Regulation could not adversely preclude an

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<sup>6</sup>This provision was written into the 1949 amendment, which became effective April 1, 1949. The Expediter issued his regulation May 1, 1949, effective April 1, 1949 (14 F. R. 2233) to provide for fair net operating return. (Sec. 5 (a) 18 of Regulation, *infra*, p. 58.)



application for a fair net operating income as provided by Sec. 5 (a) 18 of the Regulation issued pursuant to the Act. He is entitled to a fair net operating return by the terms of the Act and Regulation, and may obtain it by applying for it. The alleged failure of the appellant to obtain the benefits of the Act and Regulation are, by his admission, the result of his own failure to bring all the facts before the Expediter (R. 28-29). As shall be shown hereafter, *infra*, p. 41, appellant has no valid cause for complaint because he has failed to exhaust his administrative remedies. In any event, his failure to obtain the statutory benefits are not grounds for decontrol of his property. Appellant conceded that "the quality of the accommodations is better, \* \* \* but not structural changes made" (R. 45); the Court found no additional accommodations were created, and appellant has utterly failed to establish the burden cast upon him of proving that he comes within the exemption of the Act. (*Lassiter v. Atkinson*, 162 F. 2d 774, 778 (C. A. 9th); *Walling v. General Industries*, 330 U. S. 545, 548; *Woods v. Oak Park Chateau Corp.*, 179 F. 2d 611, 614 (C. A. 7th)).

The appellant may possibly, upon a proper showing and by availing himself of remedies in the administrative forum, establish that he is entitled to a further increase in his maximum rental (*infra*, p. 58).

2. The legislative history of Section 202 (c) (3) (A) (*infra*, p. 50) clearly shows that the Congress intended to encourage the creation of more housing than existed on February 1, 1947. In reporting the bill which eventually became the Housing and Rent

Act of 1947 (P. L. 129, 80th Cong., 1st Sess.), the House Banking and Currency Committee stated that there were two types of accommodations excluded from controls. The first of which “included \* \* \*, housing accommodations converted from existing private residential use in rental housing accommodations providing additional housing accommodations” (H. Rep. 317, 80th Cong., 1st Sess., p. 13). It was the expressed hope of the Committee that “this action [decontrol] \* \* \* will give added impetus *to the conversion of existing construction into additional rental units*, \* \* \*” (id., p. 14). [Emphasis added.] The Committee desired this exclusion from control to “stimulate the provision of sorely needed rental units” (id., p. 13).

The Expediter issued the Controlled Housing Rent Regulation (12 F. R. 4331) carrying out the provisions of the Act. In that Regulation he listed those accommodations “to which this regulation does not apply” (Section 1 (b), *infra*, p. 54). Among those accommodations exempted were “additional housing accommodations created by conversion on or after February 1, 1947 \* \* \*” (Par. 8, *infra*, p. 54). Conversion was defined in that paragraph as (1) a structural change from nonhousing use, or (2) “a structural change in a residential unit or units involving substantial alterations or remodeling *and resulting in the creation of additional housing accommodations*.” [Emphasis added.] This regulation was in effect until the passage of the Act of 1948 (P. L. 464—80th Cong., 2d Sess.).



In amending the original Act, the Congress also amended Section 202 (c) (1), (2), and (3), but did not in any way change the "conversion" provision, or direct the Expediter to amend his Regulation, as was done respecting Section 202 (c) (1) defining hotels (See p. 3, H. Rep. 1560, 80th Cong., 2d Sess.). Thus, the Expediter's regulation was ratified by the reenactment of the Act without such change. Especially is this so since the Congress fully examined the operation of that Section, and ordered changes in certain portions of it.

There can be no serious dispute that Congressional reenactment of a law which has been interpreted by regulation constitutes ratification of that regulation (*Bowles v. Wheeler*, 152 F. 2d 34, 38 (C. A. 9th), certiorari denied, 326 U. S. 775; *Pinkus v. Porter*, 155 F. 2d 90, 93 (C. A. 7th); *Woods v. Oak Park Chateau Corp.*, 179 F. 2d 611, 613 (C. A. 7th); *United Labor Committee v. Woods*, 175 F. 2d 967 (E. C. A.)). In the *Wheeler* case, *supra*, this Court said on this point:

With this frank and illuminating explanation and interpretation of departmental procedure before it, Congress extended the life of the Act. When reenactment of the statute occurs legislative ratification of the administrative interpretation may well be inferred. See *Green Valley Creamery v. United States*, 1 Cir., 108 F. 2d 342; *Brewster v. Gage*, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457; *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 51 S. Ct. 510, 75 L. Ed. 1183. If Congress was averse to this type of enforcement operations, it could have amended the enforcement provisions but it did not.

Courts are not barred from the use of such legislative history which are pertinent aids to statutory construction and legislative intent.

Subsequent to the effective date of the Act of 1948 (April 1, 1948), and prior to the renting of these accommodations (Par. 10, R. 12), the Expediter issued a series of interpretations and published them. (August 25, 1948) (13 F. R. 5001-03.) The Expediter defined the word "conversion" to mean: "(1) a change in a structure from a nonhousing to a housing use, or (2) a structural change in a residential unit or units involving substantial alterations or remodeling and *resulting in the creation of additional housing accommodations.*" [Emphasis added.] He further provided that "*where there has been a structural change involving substantial alteration or remodeling, decontrol occurs only if additional housing accommodations result from this work*" (Par. 5, 13 F. R. 5002). [Emphasis added.] The determination of whether "additional housing accommodations" are created "is made by comparing the number of dwelling units before and after the conversion" (Par. 6, *id.*).

With these interpretations of record, the Congress again amended the Act (Housing and Rent Act of 1949, P. L. 31, 81st Cong., 1st Sess., 63 Stat. 18). In amending Section 202 (c) (3) (A) (*infra*, p. 50), the Congress not only approved the prior regulations and interpretations, but also wrote these provisions into the Act itself. Both the House and Senate Committee specifically adopted the "conversion" interpretations of the Expediter. In reporting its amendment adopting the Expediter's regulation, the House Com-

mittee said that this amendment “would exclude from the category of controlled housing accommodations any housing accommodation *created* by a change from a nonhousing to a housing use on or after February 1, 1947” (P. 9, H. Rep. 215, 81st Cong., 1st Sess.) and, also, that “the existing exemption of *additional* housing accommodations created by conversion on or after February 1, 1947, is continued \* \* \*” (id.) [Emphasis added.]

In *Woods v. Ginocchio*, 180 F. 2d 484 (C. A. 9th), this Court agreed that a “conversion” of a building is within Section 825.1 (b) (8) of the Regulation, if it is:

\* \* \* “a structural change in a residential unit or units involving substantial alterations or remodeling and resulting in the creation of additional housing accommodations.”

The Senate Committee pointed out that the conversion provisions had been abused in the past. They were, therefore, tightening them to apply after April 1, 1949, only to those conversions which “actually resulted in additional self-contained family units” (P. 8, Sen. Rep. 127, 81st Cong., 1st Sess.). In other words, the Senate not only changed the Act to conform to the Expediter’s definition of additional housing accommodations, but insisted that these additional units be of a certain type and standard.

In view of this legislative history, there can be no serious doubt that the Expediter’s interpretation of the Act is entitled to great weight. *Skidmore v. Swift & Co.*, 323 U. S. 134, 139, 65 S. Ct. 161. This is the more so, “when it involves a contemporaneous con-

struction of a statute by men charged with the responsibility of setting its machinery in motion.” *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315, 53 S. Ct. 350. Cf. also *Porter v. Crawford and Doherty Foundry Co.*, 154 F. 2d 431, 433, cert. denied 329 U. S. 720, and *Bowles v. Glick Bros.*, 146 F. 2d 566, 568 (C. A. 9), dealing with the weight to be given administrative interpretations of the Administrator’s regulations.

Since these interpretations have been accepted by the Congress and embodied in the Act, they cannot be said to be “irrational” or inconsistent with the Act. That being so, the appellant’s admission that his alterations raised “the quality of the accommodations, \* \* \* but not structural changes made,” is conclusive against his contention that his premises are decontrolled by virtue of the provisions of Section 202 (c) (3) (A).

3. Nor does it avail the appellant to argue that this housing accommodation was “a theoretic condemned and abandoned building” at the time when he purchased it from the former owner (Par. 1 (a), Br. 4) and, further, that “Actually then, although not technically, it was a condemned and abandoned building *when the tenants moved out*” (Br. 8) (Emphasis added). This argument is, of course, in derogation of his previous argument, that the improvements *per se* decontrolled the premises in question. Appellant recognizes here that the creation of additional housing accommodations are essential to decontrol pursuant to Section 202 (c) (3) (A). Therefore, he argues now that he did create additional housing accommo-

dations because if he had not rehabilitated these apartments the city authorities would have taken them off the market.

It has been held that the “repair of old accommodations temporarily unfit for human occupation \* \* \*” does not exempt housing accommodations from control as newly constructed housing units. In *Elma Realty Co. v. Woods*, 169 F. 2d 172 (C. A. 1), the premises were destroyed by fire and rebuilt. In rejecting the appellant’s claim of decontrol, the Court said (at p. 174):

Had the appellant been forced to construct a new building on its land after the fire we may assume for present purposes that apartments therein, possibly even if substantially similar to the ones in its old building, would be new housing accommodations to which § 4 (e) of the Rent Regulation would apply. But it is clearly established that the appellant did not have to do this. It merely had to restore its old apartments after the fire, not build new ones, since the court below found as a fact that although “the premises were destroyed by fire to an extent which made them not habitable for human beings” enough was left “of the premises to be used as storage for furniture and other property.”

Obviously, therefore, we do not have here a case of construction of new accommodations, but clearly a case of repair of old accommodations made temporarily unfit for human occupation by casualty. Thus, although the appellant was undoubtedly entitled to an upward adjustment of its maximum rents after its apart-

ments were again habitable, nevertheless the regulations do not permit it to increase its rents until after it has applied for and obtained permission to do so. *Thierry v. Gilbert*, 1 Cir., 147 F.2d 603 \* \* \*

To accept appellant's argument as valid would place a premium on wrongdoing. A landlord could permit his premises to deteriorate, or to remain defective, so that they become hazards to the health, safety, and welfare of the community. The city authorities in the protection of the public would threaten to evict the occupants of these dwellings. If the landlord repaired the defects, and brought them into conformity with the local codes, his premises would be decontrolled under Section 202 (c) (3) (A) because he, thereby, created an "additional housing accommodation." That this contention cannot stand is shown by the apt answer made to it by the Court below:

\* \* \* If the Court were to establish the principle that whenever premises had gotten badly in repair and the landlord or owner did not repair them, then he could be freed from rent control by repairing his property, the Court would establish a most dangerous precedent. The Court would advise anyone who owned property that if they just disregarded the welfare of the tenants by allowing the roof to leak and the furnace to get out of repair so that the building would be condemned that then they could be freed from rent control and get a reward for having disregarded the welfare of the occupants of the building (R. 57).



4. Every Federal Court of original and appellate jurisdiction, including this Court, which has passed upon the problem, has recognized that a conversion must result in the creation of additional housing accommodations, in order to be exempt from federal rent control. The establishment of that fact has been recognized in those cases where the Expediter did not prevail for other reasons not material here. In *Woods v. Ginocchio*, 180 F. 2d 484 (C. A. 9th), this Court referred to an elaborate series of structural changes (See, footnote, 180 F. 2d 487-88) which created additional rooms resulting in decontrol. But the decision clearly turned upon the creation of additional accommodations. So too, the conversion of "the original five-room flat" into "two newly arranged apartments" affected decontrol in *Flynn v. Woods*, 181 F. 2d 867, 868 (C. A. 8), since there were two apartments where there was previously only one.

The district courts have been equally aware that the benefits of Section 202 (c) (3) (A) must be withheld where additional housing accommodations have not been created, or where they have been ostensibly created by the "locking of a few doors." Unreported decisions in which the official interpretation, *infra*, p. 59, has been followed are *Woods v. Rettas* (D. C. N. D. N. Y.), No. 3173, decided March 25, 1949, and *Woods v. Anderson* (D. C. E. D. Mich.), No. 7977, decided June 20, 1949.<sup>7</sup> In the *Rettas* decision the defendants made substantial alterations

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<sup>7</sup> Findings of fact and conclusions of law in these decisions appear in the Appendix (*infra*, pp. 72-80).

by converting premises from a two-family to a three-family house, and modernized the second floor apartment by installation of new plumbing, fixtures, and cabinets. In such alteration a stairway leading from the second floor apartment was enlarged for access to an upper floor, and a new apartment was created on the third floor. Following the official interpretation, the Court held that after such alterations the second floor apartment did not constitute "additional housing accommodations created by conversion," and were not removed from control under the provisions of the Act in Section 202 (c) (3).

In *Woods v. MacNeil Bros. Co.*, 80 F. Supp. 920 (D. C. Mass.), it was held that merely providing additional facilities to improve existing accommodations did not constitute new accommodations within the exemption provided in Section 202 (c) (3) of the Act. See too, *Woods v. Comstock*, No. 3138 (N. D. N. Y.), September 22, 1949, unreported (*infra*, p. 80); *Woods v. Malas*, 81 F. Supp. 485 (W. D. Wis.); *Woods v. Sequin*, No. 7262 (D. C. Mass.) (*infra*, p. 83).

None of the cases relied upon by appellant are in point. *Woods v. Baker*, 84 F. Supp. 339 (D. C. La.), is clearly distinguishable. Unlike the facts present in the instant case, in the *Baker* case there were not only structural changes but also there were "now two complete and well-adopted units where before there was only one" (p. 341).

Another case cited by appellant is *United States v. Beatty*, 88 F. Supp. 791 (S. D. Iowa). There the Court accepted the regulation and the interpretation



above cited as binding (p. 794). It concluded, however, that "the erection of a permanent wall," the "erection of an off-set wall," "the creation of a small kitchenette," "A permanent brick wall was cut through and a new doorway built," "and an additional doorway constructed to separate the west front unit from the hall," plus electric wiring and separate meters and "an independent outside entrance" (88 F. Supp. at 793), created two housing accommodations "where one existed before" (p. 795). No such facts are present in the record presented by this case and clearly no more housing units in existence after conversion than there were before.

*Woods v. Polino*, 86 F. Supp. 650 (S. D. W. Va.), cited by appellant, did not involve conversion and, therefore, is irrelevant to the facts and the law governing the judgment entered in the Court below. From the foregoing, there can be little question but that the trial court properly found that appellant did not create additional accommodations as to be entitled to decontrol under Sec. 202 (c) (3) of the Act.

## II

**There is no merit to appellant's contention that his accommodations constituted a hotel entitled to decontrol under Section 202 (c) (1) of the Act**

There is also no merit to appellant's claim to decontrol under Section 202 (c) (1) of the Act on the ground that his accommodations constituted a hotel.

The judgment of the trial court may be affirmed on either of two grounds (1) that appellant has failed to demonstrate the existence of the requisite factual

basis for satisfaction of the statutory conditions precedent to decontrol, or (2) that appellant has failed to show that the establishment was a "hotel" on the cut-off date, June 30, 1947, a condition which has received judicial approval and one within the intent of Congress.

**A. Appellant's failure to present proper and sufficient factual support for the claimed exemption is fully supported by the record**

In order for appellant to be entitled to the claimed exemption, he must show that the establishment enjoyed the status of a hotel by common knowledge in the particular community and that customary hotel services were furnished.

Sec. 202 (c) (1) provided as follows:<sup>8</sup>

Sec. 202 (c) (1) those housing accommodations, in any establishment which is commonly

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<sup>8</sup> As amended by the Housing and Rent Act of 1949, this Section now reads as follows:

"(c) The term 'controlled housing accommodations' means housing accommodations in any defense-rental area, except that it does not include—

"(1) (A) those housing accommodations, in any establishment which is located in a city of less than two million five hundred thousand population according to the 1940 decennial census and which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; or \* \* \*

"(B) (2) the term 'hotel' means any establishment which on June 30, 1947, was commonly known as a hotel in the community in which it is located and was occupied by an appreciable number of persons who were provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; or"

known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service: or''

Whether appellant's accommodations fell within this exemption of the Act as to be decontrolled was primarily a question of fact for the trial court to decide. Indeed, this is the holding of the cases cited by appellant, p. 10 of brief, viz: *Woods v. Benson*, 177 F. 2d 543 (C. A. 8th); *Woods v. Western Holding Corp.*, 173 F. 2d 655 (C. A. 8th); *Woods v. Kourmadas*, 180 F. 2d 255 (C. A. 6th).

It was stipulated that prior to June 5, 1948, the structure was operated as an apartment house (R. 12). It was appellant's testimony that, beginning September 1948, after making repairs, he provided customary hotel services. Upon cross-examination, appellant testified that the only hotel desk present was one inside the door in the manager's apartment; that there was no elevator service; that there was no switchboard for telephone service (R. 42); that there was no individual telephone service in the units but merely phones in the hallway, and that there was nothing in the lobby except a place in which to sit down (R. 43). Appellant made no claim that he provided bellboy service.

Moreover, the burden of proof was upon appellant to show not only that he provided the services called for by Sec. 202 (c) (1) but likewise that the housing

accommodations were commonly known in the community as a hotel. No proof whatever was offered on this score.

Based upon the testimony in the case, the stipulation of the parties, and based upon the Court's *own personal* inspection of the premises, the trial court found as follows:

\* \* \* The premises were neither a hotel nor generally considered or reputed as such in the community or neighborhood, but the apartments and services rendered made the tenancy unique in that the tenants were not required to accept the premises on a month-to-month basis, but could obtain them on a daily basis, weekly basis, monthly basis, or on a combination of monthly, weekly, and daily bases  
\* \* \* (R. 52).

Since this finding finds substantial support in the record, it should not be disturbed (*Woods v. Oak Park Chateau Corp.*, *supra*, 179 F. 2d at pp. 614-615).

**B. The need for relating the evidence to the June 30, 1947, cut-off date is supported by judicial opinion and the legislative history incident to the statutory provisions in question**

Apart from the facts which disqualified appellant from claiming the decontrol exemption available for hotel accommodations, plaintiff's accommodations were not eligible for decontrol under Section 202 (c) (1) of the Act because it was not a "hotel" on June 30, 1947, the cut-off date of the Act.

#### 1. *The judicial decisions*

The only decision of an appellate court squarely in point on this issue is *Woods v. Oak Park Chateau*

*Corp., supra*, 179 F. 2d at p. 613. In that case, the Court agreed with the Expediter's claim that the Act conferred the decontrol exemption only upon those housing accommodations which satisfied the statutory requirements of a hotel on June 30, 1947. The Circuit Court posed the problem before it as follows:

Before proceeding to discuss whether the court erred in holding that the units in question were not exempt, we must consider defendants' claim that the insertion by the Expediter of the June 30, 1947, cut-off date, in his regulations is "an attempt to defeat an exemption conferred by the Act." The argument is that the exemption arose from the factual situation at the time of the overcharges rather than from the factual situation on June 30, 1947.

After reviewing the provisions of the Act and Regulation, the Court said:

\* \* \* And since we entertain no doubt that Congress intended to confer an exemption upon those accommodations which satisfied the statutory requirements on June 30, 1947, it follows that the court did not err in concluding that the test date for determining decontrol of housing accommodations under the Act was June 30, 1947 (p. 613).

Other cases decided by Circuit Courts of Appeal bearing upon Section 202 (c) of the Act either are inapplicable to the question of the validity of a cut-off date for hotels or strongly tend to support appellee's position.

This Court had occasion to consider an unrelated portion of Section 202 (c) in *Koepke v. Fon-*

*tecchio*, 177 F. 2d 125. The statutory provisions there involved provided for an exemption from rent control of “(2) any motor court or any part thereof, or any tourist home serving transient guests exclusively, or any part thereof.” The Court posed the issue: “It is apparently the contention of appellant that housing accommodations, to qualify for decontrol as a motor court, must have been a motor court on June 30, 1947.” Of controlling significance is the explicit statement that only the motor court exemption was under consideration. Unlike the “hotel” provisions of Section 202 (c) (1), which set forth the specific factual determinations to be made in arriving at the ultimate finding of control or decontrol, the motor-court exemption rests merely upon a simple finding as to the class of accommodations, unattended by any definitive statutory characteristics requiring the exercise of interpretative functions. This Court held that the motor-court exemption was self-executing and did not require administrative interpretation. But to avoid any assumption that the decision as thus reached properly could be applied to any other provisions of the Act, the Court noted that its prior decision in *Babcock v. Koepke*, 175 F. 2d 923 remained in full force. The obvious significance of the preservation of the *Babcock v. Koepke* decision being that another portion of Section 202 (c), relating to exemptions for accommodations not rented during a particular 24-month period, was completely unaffected, as was any other portion of section 202 (c). In short, therefore, the *Fontecchio* case, *supra*, stands as a determination of the precise point there involved,



but is not available for support in a wholly unrelated situation.

Of interest here is the manner in which the June 30, 1947, cut-off date for hotels was accepted in *Woods v. Benson*, 177 F. 2d 543 (C. A. 8th). The question in that case was whether all of the services specified in Section 202 (c) (1) needed to have been actually utilized or whether it was sufficient for them to have been available for use. The Court obviously assumed that the test of utilization or availability of the services related to the June 30, 1947, cut-off date, and not to any more recent period, for it quoted, and at the very least tacitly accepted the administrative interpretation, that "The test date for determining control is June 30, 1947, and the exemption becomes effective only for those accommodations eligible for decontrol on that date" (at p. 545). Throughout the *Benson* opinion are references indicating acceptance of the cut-off date: "on June 30, 1947, seven of these 190 units had received the regular maid service" (p. 545) \* \* \*; [The Act] "had the same meaning on its effective date, July 1, 1947 (p. 547); "If, therefore, the hotel on June 30, 1947, provided linen service at an additional cost the fact that the guest on June 30, 1947, did not accept this service does not defeat control," quoting from the Expediter's interpretation (p. 546); and "Rooms in a hotel (see definition of hotel in section 1) which on June 30, 1947, were occupied by persons \* \* \*," quoting from the Expediter's Regulation (p. 546). Clearly the Court was fully aware of the Expediter's position as

to the cut-off date and was at least in apparent agreement with it.

In *Woods v. Western Holding Corporation*, 173 F. 2d 655 (C. A. 8th), the same Court dealt with the question in an even more direct manner. In determining whether the premises there involved satisfied the conditions precedent to decontrol for hotels, the Court accepted the Expediter's formulation of the question as: "first, whether or not the properties were on *June 30, 1947*, commonly known as hotels in the community in which they are located, and second, whether or not these properties *on that date* provided the occupants of the housing accommodations with such customary hotel services as are habitually furnished in the community. \* \* \*" [Emphasis supplied.] Again, the Court related the evidence to the cut-off date: "the two properties here involved, on and prior to June 30, 1947, and thereafter, were commonly known as hotels in the community \* \* \*" (p. 656); "for many years prior to June 30, 1947, these properties were represented and held by the owner and operator as being hotels" (p. 657); "on and prior to June 30, 1947, and thereafter, the said 130 units consisted of \* \* \*" (p. 657); "On and prior to June 30, 1947, and thereafter, all units in the two establishments were supplied with furniture \* \* \*" (657); and, quoting the legislative history, "Based upon the intent of Congress as expressed in the legislative history of the Housing and Rent Act of 1948, the word 'hotel' as used in the Act and the Regulations is interpreted to mean those establishments which on June 30, 1947, the effective date of



the Housing and Rent Act of 1947, were commonly known as hotels in the community in which they are located \* \* \*” (p. 660).

Appellant’s citation of *Woods v. Kourmadas*, 180 F. 2d 255 (C. A. 6th) is of no aid to him. The Court carefully distinguished its affirmance of the factual determinations of the trial court in that case from the situation, present here, “where the change of premises was made subsequent to the effective date of the Housing and Rent Act.” As is clear from the opinion, the Court found that the required characteristics for the hotel exemption had attached “many months prior to the effective date of the Housing and Rent Act of 1947” and that it was not necessary, therefore, to consider any question “as to the cut-off date, which excludes premises from the exemption from rent control within the intendment of the statute.” That decision, consequently, is of no relevance here.

This brief will not be labored with lower court decisions on the cut-off date. To dispose of appellant’s reference to Judge Erskine’s opinion in *United States v. Fritz Properties, Inc.*, D. C. Cal., N. D., So. Div., No. 29079-E, March 25, 1950, the Court’s opinion details at considerable length the evidence relating to the character of the premises *as of June 30, 1947*, and arrives at the finding that on *June 30, 1947*, the evidentiary factors needed for exemption were present. It would not be profitable here to discuss the factual elements involved in that case, and the legal conclusions support, rather than diminish, the force of appellee’s argument.

## 2. *The legislative history*

The legislative history also fully supports appellee's position that Congress intended to confer the exemption of the Act solely upon those accommodations which constituted a hotel within the definition of Section 202 (c) on June 30, 1947. The background of the provisions in question and the legislative history relating thereto is set forth below.

Rent control over hotels, as well as other housing accommodations, was imposed early in the war period by the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. 901, et seq.) and regulations thereunder.<sup>9</sup> The first regulatory change in the hotel regulation of interest here occurred upon the issuance on January 17, 1947, of Amendment No. 102 (12 F. R. 395) which provided for the decontrol of daily rates on rooms occupied by transient guests. This action had the practical effect of excluding from control wholly transient hotels and transient rooms in hotels which catered both to transient and permanent guests.<sup>10</sup> Upon enactment of the Act of 1947 on July 1, 1947, the Congress provided an exemption from rent control for all hotels satisfying specific standards. Thus, Section 202 (c) of the Act provided, in pertinent part:

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<sup>9</sup> The Rent Regulation for Transient Hotels, Residential Hotels, Rooming Houses and Motor Courts, 8 F. R. 7334; The Rent Regulation for Housing, 8 F. R. 7322.

<sup>10</sup> In subsequent legislation, the Congress, as is evident from the legislative history assumed that such transient accommodations would remain free of rent control and therefore concerned itself with standards for the decontrol of hotel rooms occupied by so-called permanent guests.

(c) The term "controlled housing accommodations" means housing accommodations in any defense rental area, except that it does not include

(1) those housing accommodations, in any establishment which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid services, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bell-boy service; \* \* \*.

This statutory language was in effect during the period of alleged violation in this case (September 1, 1948, to January 17, 1949). Simultaneously with this new legislative enactment, the Expediter on June 30, 1947, issued the Controlled Housing Rent Regulation (12 F. R. 4331), hereinafter called the "Regulation," which provided, in Section 1 (b) (7):

(b) *Housing to which this regulation does not apply.* This regulation does not apply to the following; \* \* \*.

(7) *Accommodations in hotels, motor courts and tourist homes.* (i) Housing accommodations in any establishment which is commonly known as a hotel (See definition of hotel in section 1) in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bell-boy service; \* \* \*

Senator CAIN. Well, we are not in sympathy with any of that business, and we will support you gentlemen in that respect.

From the foregoing, there can be no question but that the Congress was fully informed that since July 1, 1947, the Housing Expediter had been using June 30, 1947, as the date determining whether housing accommodations could qualify for decontrol. Although the Act was extensively amended on April 1, 1948,<sup>13</sup> and Congress noted its dissatisfaction with the Expediter's administration of the language relating to services, the regulatory provisions and interpretation of the Expediter with respect to the cut-off date were not disturbed. (See H. Rep. No. 1611 (Conference Report), 80th Cong., 2d Sess., p. 9.)

On July 1, 1948, the Expediter published an interpretation which set forth in detail the definition of a hotel as theretofore employed by him in the day-to-day administration of the Act. This interpretation (13 F. R. 3673) provided in part:

1. *Meaning of the word "hotel."* Based upon the intent of Congress as expressed in the legislative history of the Housing and Rent Act of 1948, the word "hotel" as used in the act and the regulations is interpreted to mean those

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<sup>13</sup> Hearings, Senate Banking and Currency Committee, 80th Cong., 1st Sess., January 30–February 24, 1947, 541 pages; Hearings, House Banking and Currency Committee on H. R. 2549, 80th Cong., 1st Sess., March 17–28, 1947, 608 pages; Hearings, Subcommittee on Senate Committee on Banking and Currency, Part 1, January 17–26, 1948, Part 2, January 28–February 4, 1948, on Extension of Rent Control, 80th Cong., 2d Sess., and Hearings, House Banking and Currency Committee, February 3–10, 1948, 80th Cong., 2d Sess.

establishments which on June 30, 1947, the effective date of the Housing and Rent Act of 1947, were commonly known as hotels in the community in which they were located and which provided occupants of housing accommodations therein with customary hotel services. \* \* \*

\* \* \* \* \*

### *3. Test date for decontrol determination.*

The test date for determining decontrol is June 30, 1947, the effective date of the Housing and Rent Act of 1947, and the exemption provided by the act and regulation is effective only for those housing accommodations meeting the requirements for decontrol on that date. If a housing accommodation meets the test as of June 30, 1947, it will not be subject to control by reason of any decreases in services after such date. If a housing accommodation does not meet the test as of June 30, 1947, it is not decontrolled even though some of the customary services which were not provided on that date were subsequently provided.

There is thus a consistent line of administrative interpretation of the provisions of Section 202 (c) of the Act and recognition and acceptance by the Congress of the administrative interpretation. However, if even the smallest doubt remains as to the validity of the Expediter's argument, in the light of the foregoing citation of legislative history and administrative action, the numerous comments made during consideration of the 1949 amendments to the Act should forcefully lay to rest any such possible

reservations. Thus, on March 10, 1949 (Cong. Rec., p. 2227), Representative Patman stated:

Mr. PATMAN. \* \* \*

I am inserting herewith answers to questions that have been propounded to the Housing Expediter and his answers thereto:

Questions and Answers on H. R. 1731 Amending the Housing and Rent Act of 1947, as Amended

\* \* \* \* \*

2. \* \* \*

Answer. The bill decontrols all accommodations in transient hotels and recontrols all accommodations in apartment and residential hotels. The test date for determining the status of a particular establishment is June 30, 1947.<sup>14</sup>

On the following day, Representative Wolcott, ranking minority member of the House Banking and Currency Committee, stated (Cong. Rec. March 11, 1949, p. 2347):

Mr. WOLCOTT. \* \* \*

They [permanent occupancy units] will go back under control. These will be the only ones which will be controlled. So what we call the permanents in transient hotels on June 30, 1947, will go back under control regardless of whether they are now being rented to transients, regardless of whether they are or are not giving the same services to these units that they may be giving to a transient unit which is

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<sup>14</sup> Review of the extensive debate on the bill, H. R. 1731, discloses no comment on the use of the June 30, 1947, cut-off date; only apparent knowledge and recognition of the specific insertion of that date in the initial regulation, issued July 1, 1947, is evident.



not under control right across the hall from it. \* \* \*

And the following statements in the House of Representatives and in the Senate bear very directly and specifically upon the point in question. In the House (Cong. Rec. March 11, 1949, p. 2347):

Mr. BUCHANAN. *The existing law as of June 30, 1947, decontrols transient hotels affecting permanent residents within those transient hotels.* [Emphasis added.]

And in the Senate (Cong. Rec. March 21, 1949, p. 2873):

Senator DOUGLAS. I would be perfectly willing to consider a provision to that effect that only the permanent accommodations in hotels which were so used on October 30, 1948, should be recontrolled, and *not merely those which were permanently occupied on June 30, 1947.* [Emphasis added.]

The several reports of both the House and Senate on bills then pending show full recognition and acceptance of the past use of the June 30, 1947, cut-off date. In the House, the Subcommittee on Banking and Currency stated, in its report (H. Rep. No. 215, 81st Cong., 1st Sess., p. 9):

The first amendment would exclude from the category of controlled housing accommodations any housing accommodations which on June 30, 1947, were located in transient hotels as distinguished from apartment or residential hotels.

In the Senate, the report on H. R. 1731 contains the following statement (Sen. Rep. No. 127, 81st Cong., 1st Sess., p. 7):

Under the committee amendments accommodations in hotels, even though provided services of the character defined, will be recontrolled unless they were used for transient occupancy on June 30, 1947.

And the Conference report to accompany H. R. 1731, which commented upon provisions shortly thereafter enacted into law, advised (Rep. No. 332, 81st Cong., 1st Sess., p. 17):

The conference substitute makes *no change in present law* for housing accommodations in hotels in cities of less than 2,500,000 population. \* \* \*

\* \* \* \* \*

(2) the term "hotel" means any establishment *which on June 30, 1947*, was commonly known as a hotel \* \* \*. [Emphasis added.]

From all of the foregoing, it would hardly seem open to serious debate that the Congress was fully aware of the Expediter's use of June 30, 1947, as the date to be used to determine the character of the housing accommodations in qualification for decontrol. This is made evident by the use of Congress itself of that date and the similar technique in the several amendments offered during consideration of rent control legislation over the past few years, the acceptance, without question, of the past use of such a rent control device, and the lack of criticism or amendment in the face of direct knowledge of that fact.<sup>15</sup>

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<sup>15</sup> In fact, it is little short of amazing that during the extensive hearings on the 1948 and 1949 amendments no witness, so far as the Expediter is able to determine, even commented upon the use



As has been previously noted, it has long been recognized that Congressional reenactment of a law which has been interpreted by regulation constitutes ratification of that regulation. *Bowles v. Wheeler*, 152 F. 2d 34, 38 (C. A. 9th); *Woods v. Oak Park Chateau Corp.*, 179 F. 2d 611 (C. A. 7th).

### III

#### Restitution is a proper remedy pursuant to Section 206 (b) of the Act

Appellant's next contention is that "only the tenant had the right to sue for overcharges"<sup>16</sup> (Br. 10). But he does not seriously argue the point since he concludes his statement with a disavowal of any legal authority to support his claim.

\* \* \* True an abundance of cases will be cited by the Expediter to support his contention here. With all due respect to the judges who decided those cases I still claim that their opinions thereon were based on a "legislative mirage"—a law which didn't exist.

In any event, if appellant is arguing against the Expediter's right to seek restitution, the contention is completely opposed to the plain language of the statute, which provides, in Section 206 (b):

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of the cut-off date, even though rent control over hotels was the subject of testimony by interested parties representing the various classes of hotels.

<sup>16</sup> This statement is inaccurate even applied to damages. The Act of 1949 gave the Expediter the right to sue for damages. Under the doctrine of *Woods v. Gianoulis*, No. 10121, decided May 18, 1950, C. A. 3d (not yet reported), the Expediter has the right to sue for damages within one year of violation.

(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

It will thus be observed that the determination to bring suit for restitution rests entirely and exclusively upon the "judgment of the Housing Expediter" and is not within the discretion of a tenant. Unlike Section 205, not here involved, which gives a right of suit for *damages* to the tenant, Section 206 (b) has for its primary purpose the vindication of the public interest, *Woods v. Richman*, 174 F. 2d 614, 615-16 (C. A. 9th), and permits the Expediter to sue for restitution. As hereinafter noted, these principles are abundantly supported by judicial opinion.

The Supreme Court has held that the Administrator (Expediter) may sue for restitution pursuant to Section 205 (a) of the Emergency Price Control Act of 1942 (50 U. S. C. A. 925 (a)) (*infra*, p. 48). *Porter v. Warner Holding Co.*, 328 U. S. 395. This Court has followed that decision and further applied it to

Section 206 (b) of the Act of 1947 (*infra*, p. 53), which is substantially the same as the former 205 (a). (*Woods v. Richman*, 174 F. 2d 614 (C. A. 9); *Woods v. McCord*, 175 F. 2d 919 (C. A. 9); *Woods v. Goch-nour*, 177 F. 2d 964 (C. A. 9), as did many other courts of equal eminence. *Woods v. Wolfe*, 182 F. 2d 516 (C. A. 3); *Woods v. Wayne*, 177 F. 2d 559 (C. A. 4); *Woods v. Witzke*, 174 F. 2d 855 (C. A. 6); *Ebeling v. Woods*, 175 F. 2d 242 (C. A. 8); and *Greider and Bennett v. Woods*, 177 F. 2d 1016 (C. A. 10)).

No useful purpose would be served in pursuing this argument further.

#### IV

**Appellant's contention that the rents established by order of the Expediter are inequitable may not be considered by this Court where appellant has failed to exhaust prescribed administrative remedies**

The appellant contends that the Court below erred in sustaining the Order of May 18, 1949, issued by the Expediter, because the rents were inequitable (Br. 11). He argues that they were not fair for two reasons: (1) The order "rolled the rentals back to April 1, 1941 \* \* \*" (id.), and (2) "\* \* \* that no allowance could have been made by Feeley for an unanticipated earthquake [in April, 1949]" (Br. 12). In addition, he says that even though the Court could not "determine what was fair and equitable" "\* \* \* it could have stayed the action and allowed Feeley to apply for an increase" (Br. 12). These contentions are without merit, because (1) the appellant has not even instituted the administrative procedure

for rent adjustment, let alone exhausted it, as he must before invoking the jurisdiction of a court of equity; and (2) the facts show unequivocally that all of the rents were increased in almost every case 150% and that any failure to obtain any other benefits of the Act and Regulation is directly chargeable to appellant's negligence.

1. The appellant has failed to exhaust his administrative remedies. The appellant petitioned for a rent adjustment on January 17, 1949, and an order was issued on May 18, 1949, increasing the rents effective the date of application (Par. 5, R. 11). *This order increased the rents to the amounts set forth in said petition.* No appeal was taken from that order, although the Revised Rent Procedural Regulation No. 1 (13 F. R. 2369) provided for such appeal.

As this Court held in *La Verne Co-op Citrus Assn. v. United States*, 143 F. 2d 415, "The principle that administrative remedies must be exhausted before one may resort to equity is well established." See, too, *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41; *Yakus v. United States*, 321 U. S. 414; *Macauley v. Waterman Steamship Corp.*, 327 U. S. 540, 544; *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752. Applying the same rule to administrative orders entered pursuant to Rent Regulations under the Emergency Price Control Act of 1942, as amended, and the Housing and Rent Act of 1947 are the recent decisions of this Court in *Woods v. Kaye*, 175 F. 2d 886 and *Babcock v. Koepke*, 175 F. 2d 923. See, too, *Smith v. Duldner*, 175 F. 2d 629 (C. A. 6th); *Gates v. Woods*, 169 F. 2d 440 (C. A. 4); *Koster v.*

*Turchi*, 173 F. 2d 605, 608 (C. A. 3); *Woods v. Durr*, 176 F. 2d 273 (C. A. 3rd).

In *Woods v. Kaye*, *supra*, the Area Rent Director issued an order pursuant to Section 4 (e) of the 1942 Regulation decreasing the rent of a housing accommodation from the first rental of \$150.00 per month. The landlord having failed to register the accommodations within the time required by Section 3 of the same Regulation, the order was made retroactive from the date when the house was first rented, and the excess rent collected was ordered refunded to the tenant. In an action by the Housing Expediter under Section 205 (a) of the 1942 Act, to compel restitution, the defendant challenged the retroactive aspect of the order and the trial court found the order to be invalid. In reversing such judgment, this Court said, at p. 889:

The administrative findings of fact underlying the retroactivity of the order are to be viewed in no different light than those upon which the maximum rent figure of \$75 per month was based, and we cannot conceive of the sufficiency of those facts being tested in the District Court. It would thus seem clear, in this situation, that the District Court is bound by these findings. The failure of the landlord to properly follow the procedure of review provided, results in a bar to contesting the enforcement action in the District Court.

While the review procedure considered in the *Kaye* case involved the sole jurisdiction of the Emergency Court of Appeals to review the order there involved, in *Babcock v. Koepke*, *supra*, this Court applied the rule requiring exhaustion of administrative remedies

to the procedure for review of orders of an Area Rent Director as provided by Revised Rent Procedural Regulation 1 issued by the Housing Expediter pursuant to Section 204 (d) of the 1947 Act. In the cited decision, an action was sought to be maintained by plaintiff against Koepke, individually and as Rent Director of the Los Angeles Defense-Rental Area, seeking a declaratory judgment that certain premises owned by plaintiff were not subject to control under the 1947 Act. After considering the applicable sections of the Regulation and the reason advanced by plaintiff for not following the administrative procedure there provided, the Court went on to say, at p. 924:

We think, however, that appellant could have presented his contention of noncontrol under the section cited *supra* [840.11] and that he failed to exhaust his administrative remedy by not so acting. If he there had prevailed, there would be no occasion to invoke the challenged provisions of 840.11.

Moreover, none of the extenuating circumstances of those cases are present here. The appellant in this case has not as yet *applied* for an adjustment based upon Section 5 (a) 18 of the Regulations (*infra*, p. 58) for a fair net operating income. As the Supreme Court said in the *Waterman Steamship Corp.* case, *supra*, "Here, just as in the *Myers* case, the administrative process, far from being exhausted, had hardly begun" (327 U. S. at 545). In this case, the Court may truly say "has not begun."



In *La Verne Co-op Citrus Assn. v. United States*, 143 F. 2d 415, this Court determined that the rule as to exhaustion of administrative remedies applies equally where the validity of an administrative order is challenged by way of defense to its enforcement as well as in cases where invalidity of the order is sought by affirmative relief. As the Court there said (143 F. 2d pp. 419, 420) :

A study of relevant decisions leaves no doubt that an equity court has no jurisdiction to examine the validity of an administrative order where the administrative remedy has not been invoked or has not been completed and where the one harmed by the administrative order is the moving party in the equity action. \* \* \*

The question then arises whether the administrative remedy rule applies where the one harmed by the administrative order is the defending party in the equity action. The doctrines of primary jurisdiction and of administrative finality are equally persuasive where the issue is raised by defending parties as where it is raised by moving parties. A consideration of the defense in an enforcement action would nullify the uniformity achieved by devising a single procedure for testing orders promulgated in accordance with the terms of the act.

To the same effect as the cited decision are *Yakus v. United States*, *supra*, 321 U. S., pp. 414, 434, 435; *United States v. Ruzicka*, 329 U. S. 287, pp. 293-294; *Woods v. Durr*, 176 F. 2d 273 (C. A. 3d).

Until the appellant here has applied for a fair net operating income, and has appealed to the Expediter, he may not come into equity and claim that his rents are not "fair and equitable."

2. The facts in this case fail to support appellant's claim of unfair treatment. He applied for an increase in rents, based upon his improvements, on January 17, 1949 (Par. 5, R. 11). The increase was granted on May 18, 1949, effective January 17, 1949, in the same amounts as applied for. On April 1, 1949, the Congress provided for a fair net operating income to landlords (Sec. 204 (b) (1), *infra*, p. 52). on May 1, 1949, the Expediter issued a regulation providing for a fair net operating income and establishing a formula to attain it (Amendment 92 (14 F. R. 2233)). .

The appellant failed to avail himself of his legal remedies by (1) failing to appeal from the order of May 18, 1949; (2) failing to include all items of costs and neglecting to include all pertinent information in his application for an increase<sup>17</sup> (R. 28); and (3) failing to apply for a fair net operating income as provided in Section 5 (a) 18 of the Regulation.

The rents on appellant's property are, therefore, either not inequitable, or the inequities can be corrected, at a time when appellant chooses to avail himself of the existing laws.

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<sup>17</sup> This argument is taken from the affidavit of appellant's employee at its face value. Nothing in the record suggests that it is correct.



## CONCLUSION

It is respectfully submitted that the judgment of the Court below is correct and should be affirmed.

ED DUPREE,

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## APPENDIX

### 1. Emergency Price Control Act of 1942, as amended (50 U. S. C. App. 925 (a))

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

### 2. The Housing and Rent Act of 1947, as amended. Public Laws 129 (Housing and Rent Act of 1947), 422 and 464 (Housing and Rent Act of 1948), 80th Congress, and Public Law 31 (Housing and Rent Act of 1949), 81st Congress (50 U. S. C. App. Sec. 1881 et seq.)

SEC. 202. As used in this title—

(c) The term “controlled housing accommodations” means housing accommodations in any defense-rental area, except that it does not include—

(1) <sup>1</sup> (A) those housing accommodations, in any establishment which is located in a city of less than two

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<sup>1</sup> This subsection was amended by Section 201 (a), Public Law 31, 81st Congress, to read as provided above. The original subsection read as follows:

“SEC. 202 (c) (1) those housing accommodations, in any establishment which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are pro-

million five hundred thousand population according to the 1940 decennial census and which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; or

(B) those housing accommodations in hotels in cities of two million five hundred thousand population or more according to the 1940 decennial census (i) which are located in hotels in which 75 per centum or more of the occupied housing accommodations on March 1, 1949, were used for transient occupancy, or (ii) which are not located in hotels described in (i) but which on March 1, 1949, were used for transient occupancy; for the purposes of this subparagraph (B)—

(1) the term “used for transient occupancy” means rented on a daily basis, to a tenant who had not on March 1, 1949, continuously resided in the hotel for ninety days or more; and

(2) the term “hotel” means any establishment which on June 30, 1947, was commonly known as a hotel in the community in which it is located and was occupied by an appreciable number of persons who were provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; or

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vided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; or”

(2) <sup>2</sup> any motor court, or any part thereof; any trailer, or trailer space, used exclusively for transient occupancy or any part thereof; or any tourist home serving transient guests exclusively, or any part thereof; or

(3) <sup>3</sup> any housing accommodations (A) the construction of which was completed on or after Febru-

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<sup>2</sup> This subsection was amended by section 201 (b), Public Law 31, 81st Congress, to read as provided above. Prior to such amendment and as amended by section 201, Public Law 464, 80th Congress, the subsection read as follows:

"SEC. 202 (c) (2) any motor court, or any part thereof; any trailer or trailer space, or any part thereof; or any tourist home serving transient guests exclusively, or any part thereof; or"

The original subsection read as follows: "Sec. 202 (c) (2) any motor court, or any part thereof; or any tourist home serving transient guests exclusively, or any part thereof; or"

<sup>3</sup> This subsection was amended by section 201 (c), Public Law 31, 81st Congress, to read as provided above. Prior to such amendment and as amended by section 201, Public Law 464, 80th Congress, the subsection read as follows:

"SEC. 202 (c) (3) any housing accommodations (A) the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their immediate families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall remain in full force and effect; or (B) which for any successive twenty-four month period during the period February 1, 1945, to the date of enactment of the Housing and Rent Act of 1948, both dates inclusive, were not rented (other than to members of the immediate family of the landlord) as housing accommodations; or (C) the construction of which was completed on or after February 1, 1945, and prior to February 1, 1947, and which between the date of completion and June 30, 1947, both dates inclusive, at no time were rented (other than to members of the immediate family of the landlord) as housing accommodations; or"

The original subsection read as follows: "SEC. 202 (c) (3) any housing accommodations (A) the construction of which was com-

ary 1, 1947, or which are housing accommodations created by a change from a nonhousing to a housing use on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947: *Provided, however,* That any housing accommodations resulting from any conversion created on or after the effective date of the Housing and Rent Act of 1949 shall continue to be controlled housing accommodations unless the Housing Expediter issues an order decontrolling them, which he shall issue if he finds that the conversion resulted in additional, self-contained family units as defined by regulations issued by him: *And provided further,* That contracts for the rental of housing accommodations to veterans of World War II and their immediate families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall remain in full force and effect; or (B) the construction of which was completed on or after February 1, 1945, and prior to February 1, 1947, and which between the date of completion and June 30, 1947, both dates inclusive, at no time were rented (other than to members of the immediate family of the landlord) as housing accommodations; or

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pleted on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their immediate families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall remain in full force and effect, or (B) which at no time during the period February 1, 1945, to January 31, 1947, both dates inclusive, were rented (other than to members of the immediate family of the occupant) as housing accommodations."

*The Housing and Rent Act of 1947, as amended*  
*Section 204 (b) (1)*

(b) (1) Subject to the provisions of paragraphs (2) and (3) of this subsection, and subsections (h) and (i), during the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such individual and general adjustments in such maximum rents in any defense-rental area or any portion thereof, or with respect to any housing accommodations or any class of housing accommodations within any such area or any portion thereof, as may be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title: *Provided, however,* That the landlord certifies that he is maintaining all services furnished as of the date determining the maximum rent and that he will continue to maintain such services so long as the adjustment in such maximum rent which may be granted continues in effect. In making and recommending individual and general adjustments to remove hardships or to correct other inequities, the Housing Expediter and the local boards shall observe the principle of maintaining maximum rents for controlled housing accommodations, so far as is practicable, at levels which will yield to landlords a fair net operating income from such housing accommodations. In determining whether the maximum rent for controlled housing ac-



accommodations yields a fair net operating income from such housing accommodations, due consideration shall be given to the following, among other relevant factors: (A) Increases in property taxes; (B) unavoidable increases in operating and maintenance expenses; (C) major capital improvement of the housing accommodations as distinguished from ordinary repair, replacement, and maintenance; (D) increases or decreases in living space, services, furniture, furnishings, or equipment; and (E) substantial deterioration of the housing accommodations, other than ordinary wear and tear, or failure to perform ordinary repair, replacement, or maintenance.

### *Section 206 (b)*

(b) <sup>5</sup> Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage

<sup>5</sup> This section was amended by section 205, Public Law 31, 81st Congress, to read as provided above. Prior to such amendment and as amended by section 203, Public Law 464, 80th Congress, this section read as follows:

(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

The original section read as follows:

"SEC. 206. (a) It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204.

"(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice

in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

### 3. Controlled housing rent regulation

(12 Federal Register 4331)

#### SECTION 1:

(b) *Housing to which this regulation does not apply.* This regulation does not apply to the following:

(8) *Accommodations first offered for rent.* (i) Housing accommodations, the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their immediate families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall

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which constitutes or will constitute a violation of subsection (a) of this section, he may make application to any Federal, State or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such subsection, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond."



remain in full force and effect; (ii) Housing accommodations which at no time during the period February 1, 1945 to January 31, 1947, both dates inclusive, were rented (other than to members of the immediate family of the occupant) as housing accommodations: *Provided, however*, That all housing accommodations referred to in this paragraph (8) shall be subject to this regulation unless the landlord files in the area rent office a report of decontrol on a form provided by the Expediter within 30 days after July 1, 1947, or within 30 days after the date of first renting, whichever is the later: and *Provided further*, That if a landlord fails to file said report of decontrol within the applicable specified period, such housing accommodations shall be and remain subject to the provisions of this regulation until the date on which he files said report.

For the purposes of this paragraph (8) the construction of housing accommodations is considered completed on the date the last material, fixture or equipment is incorporated into the structure provided the dwelling is suitable for occupancy at that time.

For the purposes of this paragraph (8) the word "conversion" means (1) a change in a structure from a non-housing use or (2) a structural change in a residential unit or units involving substantial alterations or remodeling and resulting in the creation of additional housing accommodations.

### *Section 1 (b)*

(Amended by amendment 27, 13 Federal Register 1861, effective April 1, 1948)

(2) *Decontrolled housing to which this regulation does not apply.* This regulation does not apply to the following:

(i) *Accommodations in hotels, motor courts, trailers and trailer spaces, and tourist homes.* (a) Housing accommodations in a hotel (see definition of hotel in section 1) which on June 30, 1947, were occupied by persons to whom were provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy services (not necessarily all the types of services named need be provided in all cases, as long as enough are provided to constitute customary hotel services usually supplied in establishments commonly known as hotels in the community where they are located); (b) housing accommodations in establishments which were motor courts on June 30, 1947; (c) housing accommodations located in trailers and ground space rented for trailers; and (d) housing accommodations in any tourist home serving transient guests exclusively on June 30, 1947.

(ii) *Accommodations created by new construction or conversion.* (a) Housing accommodations the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947: *Provided, however,* That maximum rents established under the Veterans' Emergency Housing Act for priority constructed housing accommodations completed on or after February 1, 1947, shall continue in full force and effect if such accommodations are being rented to veterans of World War II or their immediate families who, on June 30, 1947, either (1) occupied such housing accommodations, or (2) had a right to occupy such housing accommodations at any time on or after July 1, 1947, under any agreement whether written or oral; (b) housing accommo-

dations the construction of which was completed on or after February 1, 1945, and prior to February 1, 1947, and which between the date of completion and June 30, 1947, both dates inclusive, at no time were rented (other than to members of the immediate family of the landlord) as housing accommodations.

For the purposes of this paragraph (ii) the time at which construction of housing accommodations shall be deemed to be "completed" shall be the date on which the dwelling is first suitable for occupancy and all utility and service connections have been made, except for the installation of such items and the completion of such decoration work as, in accordance with the custom of the community, are left for installation by, or to the choice of, the purchaser or the tenant; and the word "conversion" means (1) a change in a structure from a nonhousing to a housing use or (2) a structural change in a residential unit or units involving substantial alterations, or remodeling and resulting in the creation of additional housing accommodations.

#### Section 5:

(a) *Grounds for increase of maximum rent.* Any landlord may file a petition for adjustment to increase the maximum rent otherwise allowable only on the grounds that:

(1) *Major capital improvement after effective date.* There has been on or after the effective date of the Rent Regulation for Housing, issued pursuant to the Emergency Price Control Act of 1942, as amended, a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement, and maintenance.

(14 Federal Register, 2233)

[Controlled Housing Rent Reg., Amdt. 92]

PART 825—RENT REGULATIONS UNDER THE HOUSING  
AND RENT ACT OF 1947 AS AMENDED

## CONTROLLED HOUSING RENT REGULATION

\* \* \* \* \*

(18) *Housing accommodations not yielding fair net operating income*—(ii) *Grounds*. The net operating income from the building is less than a fair net operating income: *Provided, however*, That no adjustment shall be granted under this paragraph (a) (18) with respect to housing accommodations regularly rented to employees of the landlord (so-called company housing). A petition for adjustment under this paragraph (a) (18) must be filed on Form D-106, provided by the Expediter, in accordance with instructions contained therein.

The net operating income from a building shall be considered to be less than a fair net operating income if such net operating income is less than 25 percent of the annual income in the case of a building containing less than five dwelling units, or is less than 20 percent in the case of a building containing five or more dwelling units.

(ii) *Amount of adjustment*. The adjustment under this paragraph (a) (18) shall be in such amount as is necessary to bring the net operating income from the building (expressed as a percentage of annual income) to the median net operating income of landlords generally. This median is 30 percent of annual income in the case of buildings containing less than five dwelling units, and 25 percent in the case of buildings containing five or more dwelling units.

(iii) *Successive petitions.* Where an adjustment is granted under this paragraph (a) (18) and a subsequent petition is filed thereunder, the test year used in any such subsequent petition shall begin after the end of the test year used in the last previous petition: *Provided, however,* That the Expediter may waive this limitation where the building has been affected by a significant increase in operating expenses which applied to all or an important class of housing accommodations in the community (such as a significant increase in property taxes or a significant increase in contract wages).

#### 4. Interpretation

(13 Federal Register 5001, 5002)

### PART 825—RENT REGULATIONS UNDER THE HOUSING AND RENT ACT OF 1947, AS AMENDED

#### DECONTROL OF CERTAIN CLASSES OF HOUSING ACCOMMODATIONS

The following is an interpretation of those provisions of the Rent Regulations and of the Housing and Rent Act of 1947, as amended, which provide for decontrol of the classes of housing accommodations listed below. The rent regulation provisions interpreted herein are contained in section 1 (b) (2) of the Controlled Housing Rent Regulations, as amended (§§ 825.1, 825.2, 825.3, 825.4) and of the Rent Regulations for Controlled Rooms in Rooming Houses and Other Establishments, as amended (§§ 825.5, 825.6, 825.7). The provisions of the Housing and Rent Act of 1947, as amended, which are interpreted herein are sections 202 (c) (2), 202 (c) (3) and 202 (c) (4). The classes of housing accommodations covered by this interpretation are the following:

#### I. Tourist homes.

II. Motor courts.

III. Trailers and ground space rented for trailers.

IV. Newly constructed housing accommodations completed on or after February 1, 1947.

V. Additional housing accommodations created by conversion on or after February 1, 1947.

VI. Housing accommodations not rented for any successive 24-month period between February 1, 1945, and March 30, 1948.

VII. Newly constructed housing accommodations completed between February 1, 1945, and January 31, 1947, and not rented until after June 30, 1947.

VIII. Non-housekeeping furnished accommodations located in a single dwelling unit.

I. *Tourist homes*—1. *Provision of regulations.* Section 1 (b) (2) of the regulations provides for decontrol of housing accommodations in any tourist home serving transient guests exclusively on June 30, 1947. A decontrol provision on tourist homes has been included in the regulations since July 1, 1947, based upon section 202 (c) (2) of the Housing and Rent Act of 1947 which became effective on that date. The act as amended April 1, 1948, made no change in this provision.

2. *Test date for decontrol; June 30, 1947.* The test date for decontrol of housing accommodations in tourist homes is and has been June 30, 1947. If on June 30, 1947, an establishment was a tourist home and served transient guests exclusively, all housing accommodations in that establishment are decontrolled, and this decontrol continues regardless of any change in facts or rental practices since June 30, 1947. Likewise, if on June 30, 1947, an establishment failed to meet the definition of a tourist home,



or was a tourist home which did not rent to transient guests exclusively, then the housing accommodations in that establishment are not decontrolled under the "tourist home" decontrol provision, and no subsequent change in facts or rental practices would cause them to become decontrolled by virtue of that provision.

3. *Partial decontrol.* There is no partial decontrol in the case of tourist homes. In order for any of the housing accommodations in a tourist home to be decontrolled, all the housing accommodations in the tourist home which were available for rent on June 30, 1947, must have been rented or offered for rent to transient guests on that date. For example, if only one of all the rooms was rented to a permanent guest on June 30, 1947, all the rooms in that tourist home are controlled housing accommodations.

This does not necessarily mean that there can be no decontrol where a tourist home was operated in only part of an entire structure. For example, where there was a two-family house, of which one dwelling unit was rented on a permanent basis and the other was operated as a tourist home, the latter unit comprised the tourist home. In such case, if all the accommodations in the tourist home unit which were available for rent on June 30, 1947, were rented or offered for rent to transient guests on that date, all such accommodations are decontrolled.

4. *Exemption of daily rates under old hotel regulation.* Section 4 (h) of the Rooming House Regulations continues in effect all exemptions of daily rates in tourist homes which were established under section 4 (k) of the "hotel regulation" issued pursuant to the Emergency Price Control Act of 1942, as amended.

II. *Motor courts*—1. *Provision of regulations.* Section 1 (b) (2) of the Regulations provides for decontrol of housing accommodations in establishments which were motor courts on June 30, 1947. A decontrol provision on motor courts has been included in the regulations since July 1, 1947, based upon section 202 (c) (2) of the Housing and Rent Act of 1947 which became effective on that date. The act as amended April 1, 1948, made no change in this provision.

2. *Test date for decontrol; June 30, 1947.* The test date for decontrol of housing accommodations in motor courts is and has been June 30, 1947. If on June 30, 1947, an establishment was a motor court, all the accommodations in the establishment are decontrolled, and this decontrol continues regardless of any change in facts or rental practices since June 30, 1947. Likewise, if on June 30, 1947, an establishment fails to meet the definition of a motor court, then the housing accommodations in that establishment are not decontrolled under the "motor court" decontrol provision and no subsequent change in facts or rental practices would cause them to become decontrolled by virtue of that provision.

3. *Partial decontrol.* There is no partial decontrol in the case of motor courts. If an establishment was a motor court on June 30, 1947, all the housing accommodations in that establishment are decontrolled, including trailers and trailer spaces which were attached to and operated as part of the motor court.

III. *Trailers and ground space rented for trailers.*—1. *Provision of regulations.* Section 1 (b) (2) of the regulations provides for decontrol of housing accommodations located in trailers and ground space rented for trailers.



This decontrol provision first became effective on January 5, 1948, when it was added by amendment of the regulations. The Housing and Rent Act of 1947 did not provide for decontrol of trailers and trailer spaces. However, the act as amended April 1, 1948, changed section 202 (c) (2) of the act to provide for decontrol of any trailer or trailer space, thus confirming the action previously taken by amendment of the regulations on January 5, 1948.

2. *Trailers operated as part of motor court.* Even prior to January 5, 1948, when trailers and trailer spaces as such were still under control, it had been held by interpretation that trailers and trailer spaces were decontrolled if they were attached to and operated as part of a motor court.

IV. *Newly constructed housing accommodations completed on or after February 1, 1947—1. Provision of regulations.* Section 1 (b) (2) of the regulations provides for decontrol of housing accommodations, the construction of which was completed on or after February 1, 1947. This decontrol provision, however, does not apply to maximum rents established under the Veterans Emergency Housing Act of 1946 for priority constructed housing accommodations if, and only during such time as, they are being rented to veterans of World War II or their immediate families who either:

a. Occupied such housing accommodations on June 30, 1947, or

b. Had a right on June 30, 1947, under a written or oral agreement to occupy such housing accommodations at any time on or after July 1, 1947.

Such a decontrol provision has been included in the Regulations since July 1, 1947, based upon section 202 (c) (3) of the Housing and Rent Act of 1947

which became effective on that date. The act as amended April 1, 1948, made no change in this provision.

2. *Definition of when construction is "completed"*. The regulations provide that for purposes of this provision, construction is deemed to be "completed" when the dwelling is first suitable for occupancy and all services and utility connections have been made, except for the installation of such items and the completion of such decoration work as, in accordance with the custom of the community, are left for installation by or to the choice of the purchaser or tenant.

3. *Repair or rehabilitation of damaged structures*. Where a structure which has been damaged by fire or otherwise is repaired or rehabilitated on or after February 1, 1947, a question of fact is presented as to whether new housing accommodations have been created by construction (in which event they would be decontrolled), or whether the previously existing housing accommodations have merely been repaired or rehabilitated (in which event they would not be decontrolled). Of course there may be cases in which some units in a structure are newly constructed, while other units in the same structure are merely repaired or rehabilitated. In such cases, the newly constructed units are decontrolled, while the other units remain under control.

The mere fact that the damage was so extensive as to render housing accommodations uninhabitable, forcing tenants to vacate, does not necessarily establish that the units, after completion of the repair or rehabilitation work, are eligible for decontrol.

V. *Additional housing accommodations created by conversion on or after February 1, 1947—1, Pro-*

*vision of regulations.* Section 1 (b) (2) of the regulations provides for decontrol of additional housing accommodations created by conversion on or after February 1, 1947. This decontrol provision, however, does not apply to maximum rents for priority constructed housing under the conditions stated in IV, 1 above.

Such a decontrol provision has been included in the Regulations since July 1, 1947, based upon section 202 (c) (3) of the Housing and Rent Act of 1947 which became effective on that date. The act as amended April 1, 1948, made no change in this provision.

2. *Definition of "Conversion"*. The regulations provide that for purposes of this provision the word "conversion" means (1) a change in a structure from a non-housing to a housing use, or (2) a structural change in a residential unit or units involving substantial alterations or remodeling and resulting in the creation of additional housing accommodations.

3. "Completion" of construction not an element in conversion cases. It should be noted that, whereas newly constructed housing accommodations are decontrolled if construction was "completed" on or after February 1, 1947, decontrol in the case of a conversion occurs only if additional housing accommodations were created by the conversion on or after that date. There is a substantial difference between these two concepts. For example, where the conversion resulted in additional housing accommodations which were occupied prior to February 1, 1947, they would not be decontrolled even though additional work was done on or after that date. The test is not whether the additional housing accommodations were "completed" prior to February 1, 1947, but whether they were

created prior to that date.

4. *Requirement of structural change involving substantial work.* In order for decontrol to occur by reason of conversion of previously existing housing accommodations, there must be a structural change involving substantial alterations or remodeling. For example, if a single family residence is divided into two units merely by a locking of doors and renting to two separate tenants, decontrol does not result.

5. *Requirement that additional housing accommodations result from the alterations or remodeling.* Where there has been a structural change involving substantial alteration or remodeling, decontrol occurs only if additional housing accommodations result from this work. This determination is made with respect to the dwelling unit or dwelling units which are necessarily involved in the creation of additional housing accommodations.

*Examples:* A vacant structure contains two 6-room apartments, each containing a kitchen and a bathroom. Subsequent to February 1, 1947, the landlord made structural changes in one apartment involving substantial alterations and remodeling. He converts the apartment into two apartments by adding a kitchen and a bath to two of the rooms and separating this apartment from the remaining four rooms (including kitchen) and bath. The other 6-room apartment was not involved in the conversion. The 4- and 3-room apartments are considered additional housing accommodations created by conversion and decontrolled, while the 6-room apartment remains under control.

6. *Basis for determining whether additional housing accommodations have been created.* In determining whether additional housing accommodations have

been created, the primary test is not whether there are more tenants in occupancy than before the conversion, nor whether there is more floor space. The determination is made by comparing the number of dwelling units before and after the conversion. For example: There was a 12-room vacant house which was structurally designed for single family occupancy, but which was occupied by the owner and six roomers. Subsequent to February 1, 1947, this house was converted into four individual apartments, each with its own kitchen and bath facilities. All four apartments are decontrolled.

NOTE: In the cases cited in paragraphs 5 and 6 above, the conversion took place when the accommodations were vacant. Different considerations are involved in cases where the conversion takes place while a tenant remains in occupancy. Such exceptional cases require individual treatment and are not discussed in this interpretation.

VI. *Housing accommodations not rented for any successive twenty-four month period between February 1, 1945, and March 30, 1948—1. Provision of regulations.* Section 1 (b) (2) (iii) of the regulations provides for decontrol of housing accommodations which were not rented as such for any successive 24-month period between February 1, 1945, and March 30, 1948 (both dates inclusive), other than to members of the landlord's immediate family.

The Housing and Rent Act of 1947, effective July 1, 1947, contained a decontrol provision which was the same as the present one, except that it covered only housing accommodations which were not rented at any time between February 1, 1945, and January 31, 1947, other than to members of the immediate family of the occupant. The act as amended to April 1, 1948, ex-



tended this decontrol provision to cover housing accommodations which were not rented during any successive 24-month period between February 1, 1945, and March 30, 1948, other than to members of the landlord's immediate family.

2. *Removal of house to new location.* If housing accommodations were rented during the two-year period, and were physically moved to a new location after expiration of the two-year period, they are not decontrolled. The removal of a house to a new location does not change the fact that the particular house had been rented during the two-year period. Of course, a new maximum rent should be established under section 4 (c) of the regulations, by reason of the new location, which would be subject to reduction on the basis of comparability.

3. *Rental of only part of house during two-year period.* Where only part of a house was rented during the two-year period and the portion that was rented constituted less than a predominant part of the entire house (predominance being determined on a space basis), the portion that was rented is not decontrolled. However, if the entire house is subsequently rented, as one unit, it is decontrolled and likewise the rental of any portion of the house which was not rented during the two-year period is also decontrolled.

Where only a part of a house was rented during the two-year period, and the portion that was rented constituted the predominant part of the entire house, there is no decontrol of either the entire house or of any portion that was rented during the two-year period.

4. *Rental of entire house or structure as such during two-year period.* Where, during the two-year period, an entire house was rented to a tenant as a

residence, there is no decontrol either on a rental of the entire house or on a separate renting of any portion of the house. This is because the entire house, including every portion thereof, was rented during the two-year period.

Where, during the two-year period, an apartment structure was rented as such to a master tenant who occupied one of the apartments himself and sublet the other apartments to tenants, the apartment occupied by the master tenant as well as the other apartments, are not decontrolled. This is because the apartment occupied by the master tenant was rented during the two-year period as part of the underlying lease of the entire structure. The other apartments, of course, was rented both as part of the underlying lease and separately by the master tenant.

5. *Occupancy by landlord as condition for decontrol.* Under the Housing and Rent Act of 1947 and the regulations in effect prior to April 1, 1948, where entire housing accommodations were rented during the two-year period to members of the landlord's immediate family, there was no decontrol. This is because the landlord was not an "occupant" of the housing accommodations in question, and the 1947 act and regulations provided for decontrol in such cases only if the renting was to members of the immediate family of the "occupant." This does not apply on and after April 1, 1948, because the act and regulations as amended April 1, 1948, provide for decontrol in such cases if the housing accommodations were rented to members of the immediate family of the "landlord." Occupancy by the landlord of part of the housing accommodations is no longer required as a condition of decontrol.

6. *Occupancy by tenants in common during two-year period.* In any case where during the two-year

period housing accommodations were owned by two or more individuals as tenants in common, and were occupied during that period by one or more of those individuals by virtue of their status as tenants in common, the housing accommodations are decontrolled. In other words, the relationship between tenants in common is not a landlord-tenant relationship, so that in such cases the housing accommodations have not been "rented."

7. *Occupancy by seller as part of purchase contract during two-year period.* Where a purchaser of housing accommodations, as part of a purchase contract, permits the seller to remain in possession for a limited period of time, this constitutes a "renting." Where, however, the local courts have ruled that this type of occupancy does not involve a landlord-tenant relationship, and the parties acted in reliance upon the decision of the court, the question of decontrol of the particular housing accommodations is left for decision by the local courts.

8. *Occupancy during two-year period by sole stockholder of corporation.* Where during the two-year period there was occupancy by the sole stockholder of a corporation which was the owner of the house, a question is presented as to whether there was a landlord-tenant relationship between the corporation and the sole stockholder. Ordinarily, since a corporation is a legal entity separate from its stockholders, occupancy by the sole stockholder would be on the basis of a landlord-tenant relationship, so that the housing accommodations would not be decontrolled.

9. *Housing accommodations which were exempt from rent control during two-year period.* Where during the two-year period housing accommodations were rented under circumstances which caused the renting to be exempt from the rent regulations, the



mere fact that such an exemption existed does not result in decontrol. For example, where housing accommodations were occupied during the two-year period by a janitor as part of the compensation he received for his services as janitor, the housing accommodations, so long as this situation existed, were exempt from the rent regulations. If, however, after expiration of the two-year period, the housing accommodations are no longer occupied by a janitor under such an arrangement, but are rented to a tenant under an ordinary rental agreement, the exemption ceases to apply, and the question arises whether they are decontrolled on the basis that they had not been "rented" during the two-year period. Such housing accommodations are not decontrolled on that basis because, even though they were exempt during the two-year period, they were rented during that period to a person who was not a member of the landlord's immediate family.

Another example of the same principle is the following: A college dormitory was occupied by students during the two-year period under circumstances which made rooms exempt from rent control. After the two-year period, the college proposes to rent the rooms in the structure to professors or other persons on an ordinary landlord-tenant basis. Such a renting would be subject to rent control because, although the rooms in the dormitory were exempt during the two-year period, they were in fact rented to persons other than members of the landlord's immediate family.

## 5. Unreported opinions

United States District Court for the Northern District  
of New York

Civil Action, File No. 3173

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE  
HOUSING EXPEDITER, PLAINTIFF

*v.*

STELLA RETTAS AND GEORGE RETTAS, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having duly come on for trial before this Court without a jury on February 24, 1949, plaintiff having appeared by Sylvan D. Freeman, J. S. Brounstein, of counsel; and defendant having appeared by Spira & Hershkowitz, Max H. Hershkowitz, of counsel, and after hearing testimony of witnesses and argument of counsel, and upon all the pleadings and proceedings in the cause and full consideration thereof, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff is the duly appointed Housing Expediter, Office of the Housing Expediter.

2. Defendants, George and Stella Rettas, at all times pertinent hereto were landlords and operators of housing accommodations located at premises 1122-24 Sixth Avenue, Schenectady, New York.

3. That the 2nd floor apartment at said premises, was at all times pertinent hereto, subject to the Housing & Rent Act of 1947, as amended and the Controlled Housing Regulation issued thereunder.

4. Prior to March 18, 1948, the maximum legal rent for the 2nd floor apartment was \$25.00 per month,

as indicated in a registration statement filed in the Area Rent Office.

5. In about November 1947, defendants converted the premises from a 2 family to a 3 family house, completely modernized the 2nd floor apartment by the installation of new plumbing, fixtures, and cabinets. In the course of such alteration, a stairway leading to the 3rd floor attic was enlarged for access thereto and a new apartment was created on the 3rd floor.

6. Defendants' application to the Office of the Housing Expediter for an increase in the maximum legal rent of the 2nd floor apartment resulted in an order permitting an increase to \$70.00, including heating fuel, per month, effective March 18, 1948.

7. Stephen Jason was a tenant occupying the 2nd floor apartment from December 7, 1947, to March 15, 1948, and paid the defendants the sum of \$25.00 per week during that period except that no rent was paid for the last 3 weeks thereof.

8. Tenant Roy E. Burris, Jr., occupied the 2nd floor apartment from April 1, 1948, to November 30, 1948, and paid the defendants \$80.00 per month for that period plus a total of \$57.88 for fuel oil.

9. Section 202 (c) (3) of the Housing & Rent Act of 1947 and Section 1 (b) (2) of the Regulation provide that additional housing accommodations created by conversion on or after February 1, 1947, may be decontrolled.

10. An official interpretation of these sections issued by Ed Dupree, General Counsel of the Office of the Housing Expediter on August 25, 1948, and published in the Federal Register holds that the decontrol determination is made with respect to the dwelling units which are necessarily involved in the creation of additional housing accommodations.

11. The 2nd floor apartment is not "additional

housing accommodations created by conversion'' as contemplated by the Act and Regulation thereunder.

12. Since the two tenants involved had the benefit of the modernization, on which the March 18, 1948, order of the Area Rent Director, increasing the maximum legal rent to \$70.00, was based, equity requires that that rental be used as the basis for computing overcharges.

13. The tenant Stephen Jason has been overcharged the sum of \$18.66.

14. The tenant Roy E. Burris has been overcharged the sum of \$137.88.

15. The defendants have charged rentals in excess of the legal maximum rent and because of this claim that the 2nd floor apartment is decontrolled, will continue to so overcharge unless restrained.

#### CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and subject matter of this action.

2. The 2nd floor apartment of the premises is not removed from rent control by the provisions of Section 202 (c) (3) of the Housing and Rent Act of 1947 as amended.

3. Plaintiff is entitled to an order requiring defendant to refund \$18.66 to Stephen Jason and \$137.88 to Roy E. Burris.

4. Plaintiff is entitled to a permanent injunction against the defendants as prayed for in the complaint.

Dated: Utica, New York, March 25, 1949.

(S) STEPHEN W. BRENNEN,  
*U. S. D. J.*

In the District Court of the United States for the  
Eastern District of Michigan, Southern Division

Civil Action No. 7977

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE  
HOUSING EXPEDITER, PLAINTIFF

*v.*

HARRY L. ANDERSON, 3967 ST. CLAIR STREET, DETROIT,  
MICHIGAN, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

This cause came on for hearing on the Complaint filed by the plaintiff, Answer of defendant and other pleadings, statements of counsel and evidence submitted to the Court. Upon consideration thereof the Court finds specially that:

1. Plaintiff filed the above action as Housing Expediter under the provisions of the Housing and Rent Act of 1947, as amended, seeking restitution to the tenants, or in the alternative to the United States, and a final injunction, restraining violation of the Housing and Rent Act of 1947, as amended, by the defendant.

2. The defendant, Harry L. Anderson, is the owner, landlord, and operator of the housing accommodations located at 2524-26 Pennsylvania, Detroit, Michigan, within the Detroit Defense-Rental Area.

3. Counsel for defendant stipulated in open Court that providing the housing accommodations involved herein are subject to control, the rental units, the names of the tenants, the periods of occupancy, the maximum legal rents, and the rents received by the defendant, all as set forth in Schedule "A" attached to plaintiff's Complaint are correct.

4. The sole issue raised by the defendant in this

case was that under Section 202 (c) (3) of the Housing and Rent Act of 1947, as amended, the defendant had created additional housing accommodations by conversion after February 1, 1947, and the housing accommodations involved herein were decontrolled.

5. The Controlled Housing Rent Regulation defines conversion as "(2) a structural change in a residential unit. \* \* \* involving substantial alterations or remodeling and resulting in the creation of additional housing accommodations."

6. In Interpretation 2 of Section 1 (b) 2, issued August 25, 1948, paragraph v-4 applies the requirement that for decontrol in this respect there must be a structural change involving substantial alterations or remodeling. Section 5 requires that where there has been a structural change involving substantial alterations or remodeling, decontrol occurs only if additional housing accommodations result from this work. Section 6 requires that in determining whether additional housing accommodations have been created, the primary test is not whether there are more tenants in occupancy than before the conversion. The determination is made by comparing the number of dwelling units before and after the conversion.

7. On November 25, 1947, the defendant purchased the premises consisting of four unfurnished five-room dwelling accommodations, each containing a living room, dining room, two bedrooms, kitchen, and bathroom, and each occupied by one family.

8. These four families vacated the premises on and after December 18, 1947, and the defendant then painted and decorated the premises, placed a Frigidaire and stove in each of the four kitchens, installed furnaces, hot water tanks, gutters, a wiring system,



and put locks on the doors. Some janitor service and some furnishings were provided.

9. The defendant then rented each of the identical five-room units to two families, one family occupying the living room and dining room and the other family occupying the two bedrooms, both families sharing the kitchen and bathroom.

10. No structural changes were made and no additional housing accommodations were created. The services and equipment furnished and the painting and decorating performed by the defendant do not constitute a conversion. On the contrary there resulted a restriction in the housing accommodations in that where formerly one family had the use of the kitchen and bathroom, after the change in rental plan, two families shared the kitchen and bathroom.

11. The claim of overcharges as to tenant, Joseph Johnson, was withdrawn from consideration in this case, on the ground that this tenant filed an independent action against the defendant herein to recover such overcharges.

12. From January 30, 1948, to October 7, 1948, said defendant demanded and received from Clyde Haines, rents in excess of the maximum legal rents for the use and occupancy of the upper south front rooms of said housing accommodations in the sum of \$378.00.

13. From March 1, 1948, to September 11, 1948, said defendant demanded and received from S. K. Haines for the use and occupancy of the upper north front rooms of said housing accommodations, rents in excess of the maximum legal rent in the sum of \$286.00.

14. From September 11, 1948, to December 11, 1948, said defendant demanded and received from Barbara Means for the use and occupancy of the



upper north front rooms of said housing accommodations, rents in excess of the maximum legal rent in the sum of \$123.50.

15. From December 18, 1948, to February 5, 1949, said defendant demanded and received from James Haguely for the use and occupancy of the upper north front rooms, and from March 27, 1948, to December 18, 1948, for the use and occupancy of the upper north rear rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of \$368.50.

16. From January 6, 1948, to February 3, 1949, said defendant demanded and received from W. Hawkins for the use and occupancy of the lower north front rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of \$560.00.

17. From January 7, 1948, to February 3, 1949, said defendant demanded and received from C. Arnold for the use and occupancy of the lower north rear rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of \$465.00.

18. From January 1, 1948, to February 3, 1949, said defendant demanded and received from Theo. Wimberly for the use and occupancy of the lower south front rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of \$475.00.

19. From January 1, 1948, to February 5, 1949, said defendant demanded and received from Alma Webb for the use and occupancy of the lower south rear rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of \$417.50.

## CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter of this action and of the parties thereto pursuant to Section 206 (b) of the Housing and Rent Act of 1947, as amended.

2. At all times since July 1, 1947, such accommodations have been subject to the rent controls provided in the Housing and Rent Act of 1947, as amended, and are still subject thereto.

3. Said accommodations are not free from such controls or eligible to decontrol under the provisions of Section 202 (c) of the Housing and Rent Act of 1947, as amended.

4. Defendant, Harry L. Anderson, violated the provisions of the Housing and Rent Act of 1947, as amended, by demanding, accepting, and receiving for such accommodations rentals therefor in excess of the maximum legal rent prescribed by the Housing and Rent Act of 1947, as amended, and the Controlled Housing Rent Regulation issued thereunder.

5. Plaintiff is entitled to a mandatory injunction requiring the defendant to pay to the Treasurer of the United States the sum of \$3,073.50 for the use and benefit of the tenants set out in the Findings of Fact, as follows:

Clyde Haines-----	\$378. 00
S. K. Haines-----	286. 00
Barbara Means-----	123. 50
James Haguely-----	368. 50
W. Hawkins-----	560. 00
C. Arnold-----	465. 00
Theo. Wimberly-----	475. 00
Alma Webb-----	417. 50
<hr/>	
Total-----	3, 073. 50

6. Plaintiff is entitled to an injunction enjoining the defendant, his agents, servants, employees, and

all persons in active concert or participation with the defendant from:

(a) Soliciting, demanding, accepting or receiving any rent in excess of the maximum rent prescribed by the Controlled Housing Rent Regulation as heretofore or hereafter amended or in excess of the maximum rent permitted by any other Order or Regulation heretofore or hereafter adopted pursuant to the Housing and Rent Act of 1947 as heretofore or hereafter amended, extended or superseded; and said Order shall apply to the housing accommodations involved in this action and to any other controlled housing accommodations now or hereafter owned, managed or operated by defendant.

(b) Committing any other violation of said Act or Regulation as the same is now or may hereafter be amended, extended or superseded.

7. Plaintiff is entitled to recover the costs of this proceeding.

\_\_\_\_\_,  
*United States District Judge.*

Dated: June 20, 1949.

\_\_\_\_\_  
United States District Court for the Northern District  
of New York

Civil No. 3138

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE  
HOUSING EXPEDITER, PLAINTIFF

*v.*

EDYTHE COMSTOCK, DEFENDANT

FOLEY, D. J.:

This is the usual action of the Housing Expediter based upon alleged violations by the defendant of particular provisions of the Housing and Rent Act of

1947, as amended and the Emergency Price Control Act of 1942, as amended. The complaint asks for restitution of the alleged overcharges to the tenants involved, injunctive relief, and penalty money damages in favor of the Housing Expediter.

The premises involved are located at 776 James Street, Syracuse, New York, and the dispute as to the decontrol and overcharge is confined to the second floor front unit and the first floor rear unit of such property. The action was tried and the witnesses in behalf of the government were the Area Rent Attorney for the particular area involved and the previous owner of the property. The defendant in person was the sole witness for the defense. It is interesting to note that neither of the tenants involved in the alleged overcharge testified in the action.

By the answer of the defendant, the issue presented is whether or not the substantial alteration of the premises by the defendant resulted in legal decontrol of the particular units in question. This problem must be resolved by the application of the provisions of section 202 (c) (3) of the Housing and Rent Act of 1947, as amended, and section 1 (b) (2) (ii) (a) of the Controlled Housing Rent Regulation effective April 1, 1948, which was formerly called section 1 (b) (8).

The evidence submitted by the defendant does not meet the best of decontrol as outlined in the Act and Regulation above, and particularly does not meet the administrative interpretation as to the creation of additional housing accommodations. I must follow such administrative interpretation unless "plainly erroneous or inconsistent with the regulation." (*Bowles v. Seminole Rock and Sand Co.*, 325 U. S. 410, 413.) The administrative interpretation under the Act and Regulation mainly confines the proposition of decontrol to the creation of additional housing accommoda-

tions in a particular unit or units. The over-all alteration of property which increases housing accommodations in general cannot effect decontrol of the premises as a whole.

On the trial of this action, I received proof as to the extensive alterations by the defendant which admittedly improved a deteriorating property. It was received because of unfamiliarity with the regulation and its interpretation, and for the more important purpose of determining the willfulness of the defendant in the alleged overcharges and her good faith in believing that the premises were legally decontrolled. From the evidence as a whole it is my judgment that the acts of the defendant were not willful in their nature. With her attorney she had various conferences with the Area Rent officials, and her actions throughout her difficulty do not characterize her as a scheming, knowing and concealing violator. Her transgression was ignorance and a failure to properly pursue administrative remedies to adjust her situation. Under a changing governmental policy, she would be praised for her stimulation to the building and construction trades.

As to the alleged overcharge in relation to the second floor front, the attorney for the defendant admitted the overcharge except for the month of February 1948. The plaintiff in its case produced no proof to contradict this denial. Defendant testified she did not remember being paid the February 1948 rental.

From the reasons as outlined, I arrive at these findings and conclusions: That there was no increase of housing accommodations in the second floor front unit of the premises owned by the defendant and located at 776 James Street, Syracuse, New York. That there was an overcharge of \$42.50 to the tenant of that unit,

Charles A. Fager, for the rental period from October 1, 1947 to January 31, 1948. That the total amount of such overcharge is \$170. That the violation of the defendant under the circumstances was not willful.

That there was no increase of housing accommodations in the first floor rear unit located in premises owned by defendant at 776 James Street, Syracuse, New York. That there was an overcharge of \$20 to the tenant of that unit, Earl A. White, for the rental period July 21, 1947 to August 21, 1947. That the total amount of such overcharge was in the sum of \$20. That the violation of the defendant under the circumstances was not willful.

My conclusions of law are these: That the court has jurisdiction of the persons and subject matter. That judgment may enter directing refund to Charles A. Fager in the amount of \$170 and to Earl A. White in the sum of \$20, and otherwise the relief prayed for in the complaint is denied. All motions by the defendant and reserved upon throughout the trial are hereby denied.

Dated: Albany, New York, September 22, 1949.

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United States District Court for the District of  
Massachusetts

Civil Action File No. 7622

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE  
HOUSING EXPEDITER, PLAINTIFF

*v.*

OSCAR J. SEGUIN, DEFENDANT

FINDINGS AND CONCLUSIONS

This case came on for a hearing on the merits without jury. The parties were represented by coun-



sel and were heard. Oral testimony was taken and counsel argued. The pleadings consist of a Complaint, Defendant's Answer, Plaintiff's Request for Admissions, Defendant's Answers to Plaintiff's Request for Admissions, and Plaintiff's Motion for Summary Judgment.

#### FINDINGS

1. The Defendant, Oscar J. Seguin, is a resident of Springfield, Massachusetts, and at all times material hereto was the landlord of the premises known as the second floor apartment, 826 Liberty Street, Springfield, Massachusetts.

2. The premises are located in the Springfield Defense-Rental Area.

3. The maximum legal rent for the second floor apartment, 826 Liberty Street, Springfield, Massachusetts, as established under the Rent Regulation for Housing (10 F. R. 13528), as amended, issued pursuant to Section 2 (b) of the Emergency Price Control Act of 1942, as amended, and under Controlled Housing Regulation (12 F. R. 4331), issued pursuant to the Housing and Rent Act of 1947, as amended, was twenty-seven dollars (\$27.00) a month.

4. Angelo Peters, also known as Peter P. Hatze-petra, occupied the second floor apartment, 826 Liberty Street, Springfield, Massachusetts, on the maximum rent date, March 1, 1942, until sometime in April of 1947 and paid twenty-seven dollars (\$27.00) per month rent during this entire period. This apartment was unfurnished and unheated, according to the registration of the apartment in question in the Springfield Area Rent Office. The equipment included running water, flush toilet, bathroom, electricity installed. Services included cold water, paint-



ing and decorating, interior repairs, and exterior repairs.

5. Sometime after Angelo Peters moved from the premises in question in April of 1947, and before Romeo Letendre and other occupants moved into the premises in question, the Defendant, Oscar J. Seguin, made the following improvements and added the following services: painted and papered every room, including the bathroom; extended steam piping from the downstairs store to this second floor apartment; installed a radiator in each room (never before); completely furnished the apartment with ample and better than fair furnishings; and furnished heat, hot water, electricity, and gas (never before). The Defendant, Oscar J. Seguin then rented the premises to various occupants.

6. Romeo Letendre was an occupant of a part of the premises in question from September 22, 1947, to the date of the trial of this case on January 11, 1949, and is still an occupant. He was first an occupant of the front bedroom for a short period of time paying twelve dollars (\$12.00) a week. Letendre then became an occupant of what had been a dining room and a living room which were used by him as follows: The dining room was changed into a living room and the living room into a bedroom. Letendre (with material furnished by the Defendant, Seguin) built a clothes closet in the room that had been a living room and now is a bedroom. Letendre paid eleven dollars (\$11.00) a week for the use of those two (2) rooms furnished, along with kitchen privileges and the use of the bathroom, and still occupies these two (2) rooms.

7. R. W. Dercole was an occupant of the rear bedroom, furnished from about approximately September 22, 1947 to April 18, 1948, paying ten dollars

(\$10.00) per week having kitchen privileges and the use of the bathroom.

8. Either before Letendre was an occupant of the front bedroom or after he moved from it to the other two (2) rooms, a man named Saunders was an occupant of the front bedroom. For a period of time, at present unknown, Saunders paid twelve dollars (\$12.00) per week for this room having kitchen privileges and the use of the bathroom.

9. Angelo Peters was shown a plan, or chalk, which was in evidence as an exhibit, of the second floor apartment, 826 Liberty Street, Springfield, Massachusetts. Mr. Peters stated that the plan fairly represented the five (5) rooms, including the bathroom, as they were while occupied by him from about March 1, 1942, to sometime in April 1947, with the exception that a closet had been installed in the living room.

10. Romeo Letendre, an occupant of the premises in question, when shown the plan, or chalk, of the second floor apartment, 826 Liberty Street, Springfield, Massachusetts, said that the plan shows the five (5) rooms and bathroom exactly as they were when he became an occupant of the premises in question and the plan shows the five (5) rooms and bathroom exactly as they are as of the date of trial, January 11, 1949. Mr. Letendre installed a closet in a room that had been a living room and then used it for a bedroom. This closet is indicated on the plan or chalk.

11. Mrs. Bourgoise who has been a tenant of the third floor apartment at 826 Liberty Street, Springfield, Massachusetts, for a period of at least seven (7) years testified that she had visited the second floor apartment at 826 Liberty Street, Springfield, Massachusetts, many times while Angelo Peters was

a tenant there. When shown the plan or chalk of the second floor apartment, Mrs. Bourgoise said the plan showed the five (5) rooms and the bathroom exactly as they were while Mr. Peters was a tenant, with the exception of a closet that had been added to the living room. Mrs. Bourgoise further said that she had been in the apartment in question several times since the Defendant, Seguin, had made the improvements and increased the services (she had been in this apartment within the past week before the trial of this case) and the plan shows the five (5) rooms and bathroom exactly as they are now.

12. Both Letendre and the Defendant, Seguin, said that three (3) couples, including Letendre, had occupied this second floor apartment continuously, with maybe a few weeks interval, from about September 22, 1947, to the date of trial, January 11, 1949. Letendre had been collecting money from the other two (2) couples and turning over thirty-three dollars (\$33.00) a week each week since about June 1948, including his payment for use of two (2) rooms, to the Defendant, Seguin.

13. The sole issue raised by the Defendant in this case was that under Section 202 (e) (3) of the Housing and Rent Act of 1947, as amended, the Defendant had created additional housing accommodations by conversion after February 1, 1947.

14. The second floor space consisted originally of five (5) rooms. There are still five (5) rooms no matter whether they are rented to one occupant or three occupants. The connection with the central heating system by extension of piping and the installation of radiators in each room did not increase the number of rooms. No more and no less were available than before.

15. Assuming that there are additional units, such

were not created by conversion. Any additional unit, if it could be called such, results merely from a change in the rental plan. The space in existence before February 1, 1947, could have been rented to three (3) different occupants or couples in the same manner as now in effect. There has been no conversion work creating a change in a physical sense which results in ability to institute the present system of letting to three (3) different persons, or couples.

16. The mere providing of additional facilities to improve existing accommodations does not create new accommodations nor can it be said that a facility which is newly provided, e. g., the furnishing with radiators with steam heat where none previously existed, is itself the housing facility which was created by conversion. Furniture, services, and facilities are not in themselves housing accommodations. They are included in the definition only insofar as they are connected with the use and occupancy of the basic structure and are taken together with it to constitute the complete housing accommodations.

17. The Controlled Housing Rent Regulation defines conversion as “(2) a structural change in a residential unit \* \* \* involving substantial alterations or remodeling and resulting in the creation of additional housing accommodations.”

18. In Interpretation 2 of Section 1 (b) (2), issued August 25, 1948, paragraph V-4 applies the requirement that for decontrol in this respect there must be a structural change involving substantial alterations or remodeling. I find no such change in this case. Applying the example stated, I say that a renting to more than one tenant does not achieve decontrol. Section 5 requires, that, in the event of conversion, decontrol depends on *resulting* additional units. No additional units *result* from the work done. If any, they

result only from a change in the method of renting.

19. It is my opinion that the housing accommodations were not changed so as to result in an increase of dwelling units. In substance, the landlord rented a furnished housing accommodation as one unit and not as three.

20. The apartment in question not being decontrolled, I find that the maximum legal rent at all times for that apartment to the present date is twenty-seven dollars (\$27.00) a month. The Defendant, under the Housing Regulations, Emergency Price Control Act and Controlled Housing Regulations, Housing and Rent Act of 1947, as amended, could have filed a petition for an increase in rent setting forth major capital improvements and additional services. This Defendant was notified by the Springfield Area Rent Office on several occasions that he should file a petition for an increase in rent, but the Defendant failed to heed this advice.

21. As the maximum legal rent at all times to the present date remains twenty-seven dollars (\$27.00) a month for the second floor apartment, 826 Liberty Street, Springfield, Massachusetts, I find that all rent collected in excess of that amount by the Defendant, Seguin, to be in violation of the Rent Regulations for housing accommodations in the way of an overcharge.

22. The total overcharges in rent for the second floor apartment, 826 Liberty Street, Springfield, Massachusetts, from the period September 22, 1947 to April 14, 1948 (a gap of a few weeks during which Letendre and the Defendant, Seguin, said certain rooms might not be occupied during turnover), and May 4, 1948 to January 11, 1949, amounted to one thousand seven hundred four dollars and sixty-nine cents (\$1,704.69).

23. The overcharges, as to occupant, Romeo Leten-



dre, for the housing accommodations occupied by him amount to five hundred eighty-four dollars and thirty-five cents (\$584.35) for a period of approximately sixty-five (65) weeks.

24. The overcharges as to occupant R. W. Dercole for the housing accommodations occupied by him amount to two hundred forty-five dollars and forty cents (\$245.40) for a period of approximately thirty (30) weeks.

25. The overcharges as to occupant, Saunders, period of time unknown, and as to other occupants now unknown amount to eight hundred seventy-four dollars and ninety-four cents (\$874.94).

#### CONCLUSION

On the evidence (at all times material hereto), I conclude that the premises known as the second floor apartment, 826 Liberty Street, Springfield, Massachusetts, are controlled housing accommodations under the provisions of the Emergency Price Control Act of 1942 (U. S. C. A., App. Section 901 et seq.), as amended, and of the Housing and Rent Act of 1947, as amended, and that the Defendant, Oscar J. Seguin, is the landlord thereof. I conclude that no additional housing accommodations were created by conversion on or after February 1, 1947, in the second floor apartment, 826 Liberty Street, Springfield, Massachusetts. That being so, I further conclude that the premises in question remained under rent control, under the Housing and Rent Act of 1947, as amended. I am satisfied that the maximum legal rent for the premises in question is twenty-seven dollars (\$27.00) per month. I am also satisfied that the Defendant has violated the Housing and Rent Act of 1947, as amended, by requiring the occupants, Romeo Letendre, R. W. Dercole, one Saunders, and other persons

not known, to pay rent in excess of the maximum legal rent for the premises in question. I conclude that there is a violation by way of an overcharge, and I find that the overcharge in rent amounts to one thousand seven hundred four dollars and sixty-nine cents (\$1,704.69).

Judgment may be entered in accordance with paragraph 1 of the Plaintiff's Prayer, requiring refund of the overcharge in the amount of five hundred eighty-four dollars and thirty-five cents (\$584.35) to the occupant, Romeo Letendre; also requiring refund of the overcharge of two hundred forty-five dollars and forty cents (\$245.40) to the former occupant, R. W. Dercole; also requiring the refund of the remaining overcharge of eight hundred seventy-four dollars and ninety-four cents (\$874.94) in part to one Saunders and to the other occupants now unknown; and further in accordance with paragraph 2 of the Plaintiff's Prayer, the Defendant, his agents, servants, employees, and attorneys shall be permanently enjoined from soliciting, demanding, accepting or receiving any rent for the use or occupancy of the housing accommodations described herein, or of any other controlled housing accommodations in excess of the maximum rents established pursuant to the Housing and Rent Act of 1947, as amended, or any regulation issued thereunder, as heretofore or hereafter amended, revised, or reissued; and from offering or agreeing to do any of the aforesaid. The Defendant shall further be permanently enjoined generally from violating the Housing and Rent Act of 1947, as amended. In accordance with paragraph 4 of the Plaintiff's Prayer, the Defendant (who testified in Court that he had original rent records at home) shall, from his original rent records furnish the Plaintiff with the names, the period of occupancy, and the



amount of money paid to the Defendant by one Saunders and other occupants, now unknown to the Plaintiff, during the period January 22, 1947, to April 14, 1948, and the period May 4, 1948, to January 11, 1949. Further in accordance with paragraph 4 of the Plaintiff's Prayer, if the Plaintiff is unable to locate said Saunders, or any of the occupants whose names are to be furnished the Plaintiff by the Defendant, the money due to said Saunders, or the other occupants shall be paid to the Treasurer of the United States.

Costs of Court shall be awarded the Plaintiff.

Form of Judgment may be submitted by the Plaintiff on notice.

Dated at Boston, Massachusetts, this ——— day of January 1949.

\_\_\_\_\_,  
*Judge, United States District Court.*

No. 12549

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In the United States Court of Appeals  
for the Ninth Circuit

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MIKE J. FEELEY, APPELLANT

*v.*

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF  
THE HOUSING EXPEDITER, APPELLEE

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APPEAL FROM THE UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

REPLY BRIEF OF APPELLANT

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MARK M. LITCHMAN,  
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**FILED**

OCT - 2 1950

PAUL P. O'BRIEN,  
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**In the United States Court of Appeals  
for the Ninth Circuit  
No. 12549**

**MIKE J. FEELEY, APPELLANT**

*v.*

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF  
THE HOUSING EXPEDITER, APPELLEE**

---

**APPEAL FROM THE UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION**

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**REPLY BRIEF OF APPELLANT**

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To more clearly visualize the facts and the law we will follow the precepts of two famous jurists:

“We must think things not words, or at least we must constantly translate our words into the facts for which they stand if we are to keep to the real and the true.”

Justice Oliver Wendell Holmes  
Collected Legal Papers: P. 238.

“The logic of words must yield to the logic of reality.”

Justice Brandeis  
*Di Santo v. Penn*  
273 U.S. 34, 43; 71 L. ed. 524, 529.

## THE CHANGING FACTS AND THE CHANGING LAWS

Upon the termination of the war there was a complete reversal of legislative policy to a peacetime economy by the lifting of controls over wages, salaries, materials, manpower, prices which included rents as we shall hereinafter prove. By this turn about in congressional policy it was hoped "that adequate prices . . . (will) stimulate the production of the things desired." Among the things needed particularly were dwellings.

Leg. Hist. U.S. Code Cong. Service 1946, P. 1297  
*Woods v. Polino*, 86 F. Supp. 650, 654.

When Congress terminated the E.P.C.A. of 1942 it didn't cut the cloth by leaving behind a small piece to retain control of rentals. It shelved the entire bolt. The Housing and Rent Act of 1947 was a cloth of an entirely different pattern which differences were brought out on pages 6 and 7 of our opening Brief and which will be stated in abbreviated form in the Appendix.

Obviously such a drastic change in the law—the standard of legal conduct—is bound to bring into question the applicability of cases and administrative regulations based on a prior legal standard. A change by the higher power is bound to affect the lower, otherwise the tail will be wagging the dog.

Let us emphasize that Congress followed through

with price and rent decontrols even in the Housing and Rent Act for many accommodations were excluded and of those controlled a new legislative policy was established in Sec. 1891 50 App. U.S.C.A. (Sec. 201 of the act) whereby landlords are permitted to obtain a reasonable rental and only prohibiting heavy increases and as to these restrictions further limitations were imposed as to time and area.

“A change in language is indicative of an intention to change the law and the court may give little or no weight to an administrative construction of a prior statute in determining the meaning of a subsequent and materially changed statute.”

42 Am. Jur. 410, 411, *Spring City etc. v. Com- of Int. Rev.*, 292 US 182; 78 L ed. 1200.

The changed objective in the Housing and Rent Act is to encourage the investment of money in the housing field because there exists an acute housing shortage. The Expediter admits on pages 7 and 8 of his Brief that it was the intention of Congress by the passage of this Act to “create more housing” but there he stops, for he cites cases decided under the E.P.C.A. such as *Elma Realty Co. v. Woods*, 169 F. 2d 172 (C 1), on the dogged assumption that the two acts are the same in purpose, intention and language.

Even simple words are given stretched meanings under the guise of administrative regulations by the Expediter to maintain War Emergency Price Controls.

Here is an illustration taken from page 55 of his Brief.

“For the purposes of this paragraph (8) the word ‘conversion’ means (1) a change in a structure from non-housing use or (2) a structural change in a residential unit. . . .”

According to the Expediter, if a clothing manufacturer converted his business to making buttons he wouldn’t be making buttons unless there was a change in the structure or a structural change.

“Administrative construction will not be permitted to override the plain language of the law . . . accordingly, where a statute is not ambiguous and its construction is not doubtful, the rule that Courts will give way to an administrative construction in determining the true meaning of a statute is not applicable even though the statute has been reenacted in the light of such construction.”—42 Am. Jur. 403, 404, citing cases.

“There are several general limitations upon the doctrine that the administrative construction will be given weight. . . . Chiefly, they are that the statute must be one subject to construction, that it is ambiguous, that judicial construction is wanting, and that the administrative construction must be reasonable, must not enlarge or restrict the scope of the statute and must have been made in the discharge of official duties.”—42 Am. Jur. 400, 401, citing cases.

More of such stretched—if not transplanted—meanings will be quoted later.

## ENCOURAGEMENT TO INCREASE HOUSING

What Congressional purpose or objective would have been served by Feeley's allowing his accommodations to be condemned by the Health and Fire Departments of the City of Seattle as unfit for human habitation? It is admitted that he was not responsible for this condition. Sure, the premises would have been under control but what would the Expediter have controlled without tenants? Pointedly, it would have decreased housing accommodations in Seattle. Was that the objective Congress had in mind?

The suggestion of Appellee on page 17 of his Brief that all a landlord would have to do to decontrol his premises is to negligently permit it to be condemned by the City authorities. The answer to this argument is that Appellee must have had in mind an insane, incompetent or foolish person because none other would so depreciate his property as to render it practically valueless. Worse still, such a financial suicidal procedure would involve the financial risk of converting it by paying tremendously increased prices to rehabilitate and renovate it. The Court will take judicial notice that the cost of building materials, labor and house furnishings have tremendously increased since the war. In addition the foolish landlord would have to overcome the bad reputation given to the property as a former condemned building. In support of Appellee's contention that Feeley added nothing to increase the housing accommodations of Seattle he cited

the Elma Realty Co. case *supra*, where the premises were partially destroyed by fire. This suit was brought under the E.P.C.A. and that Act was strictly construed and therefore has no application here. To the inferred argument that a landlord would "fire" his premises to decontrol it the answer is, that landlords as a class are not going to become wholesale arsonists.

Feeley, in line with Congressional policy, took an unhealthy and unsafe building expending thousands of dollars for labor, material, furniture, furnishings and equipment and rehabilitated and renovated it for occupancy. It was a non-housing building. Had it remained vacant—which it was for two months—it would have been zero housing. He added 17 units and according to a law of mathematics over which the Expediter has no control, 17 added to zero makes 17. We therefore contend that Feeley's actions come within the purview of Sec. 1892 50 App. U.S.C.A. (Sec. 202 of the Act) which eliminates from control the following accommodations

"(3) Any housing accommodation . . . which are housing accommodations created by a change from a non-housing to a housing use on or after February 1, 1947 or which are additional housing accommodations created by conversion on or after February 1, 1947."

#### **FEELEY'S ACCOMMODATIONS WERE THOSE OF A HOTEL**

Feeley's services were those furnished only in hotels.

On pages 9 and 10 of our Brief we cite cases where a variety of lesser services were offered in establishments approved as hotels. With all due respect to the deceased Trial Judge, "he hadn't been around hotels" as was the writer who slept in many a "Hotel de Bum"—this was years ago—many of which still exist today in the poorer sections of large and small cities where the only "accommodation" is a bed; a bathroom down the hall and where telephone service, bell boy service and the like are unknown. It is admitted that Feeley furnished more hotel services to his occupants than did most hotels (R 12, 39). More frequently than not hotels rent by the day and week. This was true in Feeley's case for in the Findings (R. 21) the Trial Judge found "The tenants were permitted to remain in possession for short and odd terms."

### **GEOGRAPHICAL FACTS**

#### **The "Transplanting" of "June 30, 1947"**

Contention is made on page 20 of Appellee's Brief that since Feeley did not operate his apartment-hotel until after June 30, 1947 his accommodations do not come within the provisions of decontrol in Section 202 of the Act.

First let us state that Seattle in 1940 had less than 400,000 population according to the United States Census and it has considerably less than 2½ million in 1950.



The Act divides the decontrolled hotels according to population. Sub-paragraph (A) of Sub-section (c) of Sec. 202 of the Act (Sec. 1892 50 APP. U.S.C.A.) sets forth the services required for hotels for cities of less than 2½ million according to the 1940 Census.

Nowhere in Sub-paragraph (A) pertaining to cities the size of Seattle is there any mention of June 30, 1947.

However, there is mention of that date in Sub-paragraph (B) pertaining to cities such as Chicago and New York, the only two having populations of more than 2½ million. It is pointedly so directed.

On the last two lines of (B) appears the following: . . .

“ . . . for the purpose of this Sub-paragraph (B)—

(1.) (Describes a certain term.)

(2.) The term ‘hotel means any establishment which on June 30, 1947 was commonly known as a hotel . . .’

Upon what legal theory does the Expediter claim the power to transplant a word, phrase, or date from one statute or a part of a statute to another which the Congress has seen fit to exclude? Do not geographical facts in statutes or cases mean anything to him?

He cites *Woods v. Oak Park etc.*, 179 F. 2d 611 (7 C) which involves a Chicago Hotel and which according to the 1940 census had more than 2½ million population.

*Koepke v. Fontecchio*, 177 F. 2d 125, 128 (9 C)

“A statute may not under the guise of interpretation be modified, revised, amended, destroyed, remodelled or rewritten or given a construction of which its words are not susceptible or which is repugnant to its terms.”

50 Am. Jur. 213, 214.

### THE INEQUITABLE RENTALS

Suit was brought by the Expediter against Feeley on February 21, 1949 (R. 6). At that time Feeley was operating accommodations as a hotel and was charging hotel rates. May 18, 1949 a new rental rate was established by the local Expediter (R. 11). The case was then in court. Aside from asking permission from the Court to appeal what reason could Appellant give as a basis for such an appeal to the Appellee? If the Appellant had appealed no doubt the Appellee would have denied the appeal on the ground that Feeley had not had sufficient time to determine that the rates so established were too low.

This is not a case where a rental rate is established for a long time and a landlord has had an opportunity for determining from the actual cash receipts and expenses paid that the established rates are too low.

The facts in this case are altogether different than any of the cases cited by counsel. It was not until after Appellant discovered the damage done by the earthquake in Seattle which was not latent, and the

loss of commercial revenue (R. 28) and which had been figured in the income, that Feeley realized that the rentals were too low to operate excepting at a big loss. There is no procedural remedy for this kind of a case. The pertinent facts for an equitable increase didn't take place until after the trial. The Trial Court should have allowed us to petition for new rates in the light of the increased expenses to cover the losses. Equity doesn't suffer a wrong to go without a remedy.

We respectfully submit that Feeley's apartment-hotel was not subject to control because it was: additional housing; converted from an empty building; and a hotel. That if, the accommodations were subject to control, that the case be reversed so that Feeley be permitted to petition for an increase of retroactive rentals to cover the additional expenses incurred and thereby lessen the amount of the judgment.

Respectfully submitted,

MARK M. LITCHMAN,  
*Attorney for Appellant.*

414 American Building  
Seattle 4, Washington.

## APPENDIX

Housing and Rent Act of 1947 and amendments.

Sections in 50 App. U.S.C.A. will be cited because they contain the Congressional trends from 1947 on. Sections of the Act will appear in parentheses.

Secs. 1881 to 1884 provide housing assistance for veterans.

Sec. 1891 (201) recites the declaration of policy for the Act; reaffirms the policy expressed in the Price Control Extension Act of 1946 (which provided for the decontrol of prices and rents) excepting that during the period of transition certain rental restrictions will have to be imposed but with a view that hardships to landlords shall be eliminated.

Sec. 1892 (202) defines the various terms including controlled and decontrolled accommodations, hotels, motels, etc. This is the principal section that both parties are claiming their rights flow from.

Sec. 1893 (203) provides for the termination of rent control under the Emergency Price Control Act.

Sec. 1894 (204) provides the manner in which the Act shall be administered; requiring the Expediter to allow the landlord "a fair net operating income"; established local advisory boards to recommend decontrols in areas and adjustments of rents, etc.

Sec. 1895 (205) provides for the recovery of dam-

ages by the tenants. After the suit was brought against Feeley this section was amended to permit the United States to bring the action.

Sec. 1896 (206) provides the manner in which the Act may be enforced.

The remaining sections of the Act are of no consequence here excepting some of the sections recite new terminations and reenactments of the Act.

No. 12549

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**In the United States Court of Appeals  
for the Ninth Circuit**

---

MIKE J. FEELEY, APPELLANT

*v.*

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF  
THE HOUSING EXPEDITER, APPELLEE

---

APPEAL FROM THE UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

**APPELLANT'S PETITION FOR REHEARING**

---

MARK M. LITCHMAN,  
*Attorney for Appellant.*

Office and P. O. Address:  
414 American Building  
Seattle 4, Washington.

---

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No. 12549

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**In the United States Court of Appeals  
for the Ninth Circuit**

**No. 12549**

**MIKE J. FEELEY, APPELLANT**

*v.*

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF  
THE HOUSING EXPEDITER, APPELLEE**

---

**APPEAL FROM THE UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION**

---

**PETITION FOR REHEARING OF JUDGMENT**

**Filed June 15, 1951**

The Appellant respectfully petitions the Court for a rehearing on the ground that the Court erred in applying the wrong theory of law.

In contrasting the Emergency Price Control Act of 1942 and the Housing and Rent Acts Appellant attempted to bring out sharply the “essential dissimilar” legislative standards for legal conduct for landlords and tenants.

The U. S. Supreme Court did likewise and in much stronger language pointed out the differences between the two statutes, on page 602 (92 L ed)

“The powers thus delegated are far less extensive than those sustained in *Bowles v. Willingham* (321 U.S. 512, 68 L ed. 901, 64 S. Court 641). *Nor is there here a grant of unbridled administrative discretion.*” (Italics ours)

*Woods v. Miller*, 92 L ed. 596, 333 U.S. 138, 68 S. Ct. 421.

Moreover, in the light of the rapidly changing global and internal situations — “including the social, economic and governmental conditions of the state or country” (50 Am. Jur. 277, Sec. 295) Appellant attempted to furnish this court a yard stick, a practical lawyer’s, if not a judicial, formula for measuring the “outs and ins” of changing legislation in the hope that decisions as well as attitudes based on an “out” statute will not control the one which is displaced. This legal “Time-Conditions” formula was set forth on page 5 of the opening brief and is known as “legal relativity.” This “nut shell” application of the theory was expanded by Appellant’s counsel in the second

section of an article published nearly 20 years ago in the June 1932 issue of the Temple Law Quarterly, Vol. VI, No. 4, 515 pp 531-536 entitled "The Application of the Theory of Relativity to Law."

The decision of the Court not only ignores the passing of time, the changed economic conditions, the many dissimilarities and the differing objectives of the two statutes but also the distinctions made by the U. S. Supreme Court of the two "out and in" statutes in the *Woods v. Miller* case, *supra*.

In conclusion, if the Court is not interested in a theory let us reiterate this mathematical fact: that if the City of Seattle had condemned the building as being unsafe and unhealthy there would have been 17 less tenants, the very opposite of which is the objective of the Housing and Rent Acts. By way of a further contrast, judicial notice should be taken that Los Angeles and Portland in the 9th Circuit are free from rent control which would not have been allowed under the *Bowles v. Willingham* decision, *supra*. Moreover, the action should have been stayed



to permit review of unanticipated "earthquake" damage.

*Woods v. Gates*, 88 F. Supp. 867.

Respectfully submitted,

MARK M. LITCHMAN,  
*Attorney for Appellant.*

414 American Building,  
Seattle 4, Washington.

---

I hereby certify that the above Petition in my judgment is well founded in law and is not interposed for delay.

MARK M. LITCHMAN,  
*Attorney for Appellant.*

No. 12550

United States  
Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,	Petitioner,
vs.	
MAY CHANDLER GOODAN, et al.,	Respondent.
COMMISSIONER OF INTERNAL REVENUE,	Petitioner,
vs.	
MARIAN OTIS CHANDLER,	Respondent.
COMMISSIONER OF INTERNAL REVENUE,	Petitioner,
vs.	
NORMAN CHANDLER,	Respondent.
COMMISSIONER OF INTERNAL REVENUE,	Petitioner,
vs.	
PHILIP CHANDLER,	Respondent.
COMMISSIONER OF INTERNAL REVENUE,	Petitioner,
vs.	
CONSTANCE CHANDLER CROWE,	Respondent.
COMMISSIONER OF INTERNAL REVENUE,	Petitioner,
vs.	
HELEN CHANDLER GARLAND,	Respondent.
COMMISSIONER OF INTERNAL REVENUE,	Petitioner,
vs.	
RUTH C. WILLIAMSON,	Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court  
of the United States.



No. 12550

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United States  
Court of Appeals  
For the Ninth Circuit.

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COMMISSIONER OF INTERNAL REVENUE,	Petitioner,
vs.	
MAY CHANDLER GOODAN, et al.,	Respondent.
COMMISSIONER OF INTERNAL REVENUE,	Petitioner,
vs.	
MARIAN OTIS CHANDLER,	Respondent.
COMMISSIONER OF INTERNAL REVENUE,	Petitioner,
vs.	
NORMAN CHANDLER,	Respondent.
COMMISSIONER OF INTERNAL REVENUE,	Petitioner,
vs.	
PHILIP CHANDLER,	Respondent.
COMMISSIONER OF INTERNAL REVENUE,	Petitioner,
vs.	
CONSTANCE CHANDLER CROWE,	Respondent.
COMMISSIONER OF INTERNAL REVENUE,	Petitioner,
vs.	
HELEN CHANDLER GARLAND,	Respondent.
COMMISSIONER OF INTERNAL REVENUE,	Petitioner,
vs.	
RUTH C. WILLIAMSON,	Respondent.

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Transcript of Record

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Petitions to Review Decisions of The Tax Court  
of the United States.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## APPEARANCES

For Petitioner,

A. CALDER MACKAY, ESQ.

ARTHUR MCGREGOR, ESQ.

HOWARD W. REYNOLDS, ESQ.

ADAM Y. BENNION, ESQ.

WM. Y. BENNION, ESQ.

WM. GALBALLY, JR., ESQ.

For Respondent,

H. A. MELVILLE, ESQ.

B. H. NEBLETT, ESQ.

HAROLD D. THOMAS

E. C. CROUTER, ESQ.

lder, May Chandler Goodan, Constance Chandler (Constance Chandler Crowe), Ruth C. Williamson, Norman Chandler, Harrison G. O. Chandler, Helen C. Garland, and Philip Chandler are designated "present trustees."

(c) The petitioner, as a beneficiary, during the year 1938 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$8,597.49, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1938 was the sum of \$11,446.46, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$2,848.97. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(d) The petitioner, as a beneficiary, during the year 1939 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$8,389.89, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1939 was the sum of \$12,418.07, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$4,028.18. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(e) The petitioner, as a beneficiary, during the year 1940 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$9,385.93, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1940 was the sum of \$13,413.67, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$4,027.74. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(f) The petitioner, as a beneficiary, during the year 1941 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$10,527.69, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1941 was the sum of \$12,563.85, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$2,036.16. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(g) Respondent, under date of June 30, 1943, issued a notice of deficiency determining that said Trust No. 2 was an association taxable as a corporation. Under date of June 30, 1943, respondent is-

sued a notice of deficiency determining that Trust No. 1, wherein Harry Chandler, Norman Chandler, and Marian Otis Chandler are designated "present trustees" and petitioner and others are designated "beneficiaries," was an association taxable as a corporation. Petitioner is informed and believes and therefore alleges that the trustees of each of the aforementioned trusts have filed or will file a petition to The United States Tax Court for a redetermination of the deficiencies set forth in said notices, and that the actions of the respondent in determining said trusts to be associations taxable as corporations and in determining the deficiencies herein involved are inconsistent, erroneous, and illegal.

Wherefore, petitioner prays that The Tax Court of the United States hear this petition and redetermine the aforesaid deficiencies in accordance with the rights of the petitioner in the premises and grant any and all refunds that may be due as a result of such redetermination.

Dated September 24, 1943.

/s/ WILLIAM GALBALLY, JR.,  
Counsel for Petitioner.

State of California

County of Los Angeles—ss.

May Chandler Goodan, being duly sworn, says that she is the petitioner above named; that she has read the foregoing petition or had the same read to her, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief and that those she believes to be true.

/s/ MAY CHANDLER GOODAN.

Subscribed and sworn to before me this 24th day of September, 1943.

[Seal]      /s/ FLORENCE E. SCALLEN,  
Notary Public.

My commission expires Feb. 27, 1946.

## EXHIBIT "A"

Treasury Department Internal Revenue Service  
417 South Hill Street  
Los Angeles 13, California

June 30, 1943

Los Angeles Div.

LA:IT:90D:PB

Mrs. May Chandler Goodan,  
2440 North Vermont Avenue,  
Los Angeles, California.

Madam:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1938 to 1941, inclusive, discloses a deficiency of \$26,802.62 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward

it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,  
Commissioner,

By /s/ GEORGE D. MARTIN,  
Internal Revenue Agent in  
Charge.

PS:dd

Enclosures:

Statement

Form of waiver.



## Statement

LA:IT:90D:PB

Mrs. May Chandler Goodan,  
2440 North Vermont Avenue,  
Los Angeles, California.

Tax Liability for the Taxable Years Ended  
December 31, 1938, to 1941, Inclusive  
Income Tax

Year	Liability	Assessed	Deficiency
1938.....	\$ 5,746.44	\$ 4,797.77	\$ 948.67
1939.....	29,513.20	6,903.65	22,609.55
1940.....	20,173.82	18,276.19	1,897.63
1941.....	34,055.78	32,709.01	1,346.77
Total .....	\$89,489.24	\$62,686.62	\$26,802.62

This determination of your income tax liability has been made upon the basis of information on file in this office.

If you do not acquiesce in all of the adjustments making up the deficiency indicated, but desire to stop the accumulation of interest on that part of the deficiency resulting from adjustments to which you agree, please fill out the enclosed form of waiver, inserting therein the amount of the deficiency you desire to have assessed at once. The execution of the form for the agreed portion of the deficiency will not deprive you of your right to petition The Tax Court of the United States for a redetermination of the deficiency.

A copy of this letter and statement has been mailed to your representative, Mr. William Galbally, 510 South Spring Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you.

## Adjustments to Net Income

## Taxable Year Ended December 31, 1938

Net income as disclosed by return .....	\$36,057.36
Additional income and unallowable deductions:	
(a) Automobile expenses disallowed .....	\$ 500.00
(b) Dividends received .....	5.00
(c) Interest received .....	208.28
(d) Trust income .....	2,524.76
(e) Depreciation disallowed .....	400.00
(f) Interest disallowed .....	250.35
(g) Taxes disallowed .....	61.44
	3,949.83
Total .....	\$40,007.19

Additional deduction:

(h) Ranch loss allowed ..... 149.20

Net income adjusted .....\$39,857.99

### Explanation of Adjustments

(a) The deduction of \$500.00 claimed in your return against salary income for automobile expenses is not allowable under the provisions of section 23(a) of the Revenue Act of 1938.

(b) The amount reported in your return as dividends received from Citizens National Trust and Savings Bank is understated \$5.00.

(c) You failed to report \$208.28 interest on savings account at Vermont and Hollywood Branch of Security-First National Bank.

(d) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount reported in your return	Amount determined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1".....	\$17,951.66	\$17,627.45	\$(324.21)
"Chandler Trust No. 2".....	8,597.49	11,446.46	2,848.97
Total .....	\$26,549.15	\$29,073.91	\$2,524.76

(e) The deduction of \$1,125.00 claimed in your return for depreciation on warehouse is \$400.00 in excess of the amount allowable under the provisions of section 23(l) of the Revenue Act of 1938.

(f) The deduction claimed for interest is overstated \$250.35.

(g) The deduction claimed for taxes is overstated \$61.44.

(h) A deduction is allowed for your community half of \$298.40 ranch loss, not claimed in your return.

### Computation of Tax

Taxable Year Ended December 31, 1938

Net Income Adjusted .....	\$39,857.99
Less: Personal exemption .....	\$2,500.00
Credit for dependents .....	800.00    3,300.00
Balance (surtax net income) .....	\$36,557.99
Less: Earned income credit .....	1,264.00
Net income subject to normal tax .....	\$35,293.99

Normal tax at 4% on \$35,293.99 .....	\$1,411.76
Surtax on \$36,557.99 .....	4,337.18
Total income tax .....	\$ 5,748.94
Less: Income tax paid at source .....	2.50
Correct income tax liability .....	\$ 5,746.44
Income tax assessed:	
Original, account No. 204921 .....	4,797.77
Deficiency of income tax .....	\$ 948.67

## Adjustments to Net Income

Taxable Year Ended December 31, 1939

Net income as disclosed by return .....	\$44,140.69
Additional income and unallowable deductions:	
(a) Compensation for services .....	\$ 2,547.19
(b) Interest received .....	45,863.20
(c) Trust income .....	3,686.74
(d) Depreciation disallowed .....	25.37
(e) Interest disallowed .....	240.57
(f) Taxes disallowed .....	147.23
Total .....	\$96,650.99
Additional deduction:	
(g) Ranch loss .....	860.82
Net income adjusted .....	\$95,790.17

## Explanation of Adjustments

(a) You failed to report your community half of \$5,094.38 fees received by your husband as Administrator of Estate of Frances Chandler Kirkpatrick, Deceased.

(b) This represents \$45,667.76 interest constructively received on "Vermejo Club" note and \$195.44 interest received on savings account, not reported in your return.

(c) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount reported in your return	Amount determined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1" .....	\$21,560.46	\$21,219.02	\$(341.44)
"Chandler Trust No. 2" .....	8,389.89	12,418.07	4,028.18
Total .....	\$29,950.35	\$33,637.09	\$3,686.74

(d) The deduction of \$750.37 claimed in your return for depreciation on warehouse is \$25.37 in excess of the amount allowable under the provisions of section 23(1) of the Internal Revenue Code.

(e) The deduction claimed for interest is overstated \$240.57.

(f) The deduction claimed for taxes is overstated \$147.23.

(g) A deduction is allowed for your community half of \$1,721.63 ranch loss, not claimed in your return.

### Computation of Tax

Taxable Year Ended December 31, 1939

Net Income Adjusted .....	\$95,790.17
Less: Personal exemption .....	\$ 2,500.00
Credit for dependents .....	800.00    3,300.00
Balance (surtax net income) .....	\$92,490.17
Less: Earned income credit .....	1,400.00
Net income subject to normal tax .....	\$91,090.17
Normal tax at 4% on \$91,090.17 .....	\$ 3,643.61
Surtax on \$92,490.17 .....	25,869.59
Total income tax .....	\$29,513.20
Correct income tax liability .....	\$29,513.20
Income tax assessed:	
Original, account No. 202525 .....	6,903.65
Deficiency of income tax .....	\$22,609.55

### Adjustments to Net Income

Taxable Year Ended December 31, 1940

Net income as disclosed by return .....	\$58,812.10
Additional income and unallowable deductions:	
(a) Trust income .....	\$3,690.42
(b) Depreciation disallowed .....	314.49
(c) Mathematical error .....	50.00
(d) Contributions disallowed .....	260.00
(e) Interest disallowed .....	438.83
(f) Taxes disallowed .....	671.63    5,425.37
Total .....	\$64,237.47
Reductions in income:	
(g) Interest received .....	\$ 403.72
(h) Ranch loss .....	1,417.42    1,821.14
Net income adjusted .....	\$62,416.33

## Explanation of Adjustments

(a) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1".....	\$23,314.74	\$22,977.42	\$(337.32)
"Chandler Trust No. 2".....	9,385.93	13,413.67	4,027.74
Total .....	\$32,700.67	\$36,391.09	\$3,690.42

(b) The deduction of \$750.38 claimed in your return for depreciation on warehouse is \$25.88 in excess of the amount allowable under the provisions of section 23(1) of the Internal Revenue Code, and similarly the deduction of \$460.87 claimed for depreciation on property used in "Goodhue's" business is excessive in the amount of \$288.61.

(c) As a result of a mathematical error the net income reported in your return from the operation of "Glendale Furniture Co." and "Goodhue's" is understated \$50.00.

(d) The deduction claimed for contributions includes an amount of \$260.00 not allowable under the provisions of section 23(o) of the Internal Revenue Code.

(e) The deduction claimed for interest is overstated \$438.83.

(f) The deduction claimed for taxes is overstated \$671.63.

(g) The total of the interest on savings accounts added to income under adjustment (c) for 1938 and (b) for 1939 is here eliminated from income.

(h) A deduction is allowed for your community half of \$2,834.83 ranch loss, not claimed in your return.

## Computation of Tax

Taxable Year Ended December 31, 1940

Net Income Adjusted .....	\$62,416.33
Less: Personal exemption .....	\$ 2,000.00
Credit for dependents .....	800.00
Balance (surtax net income) .....	\$59,616.33
Less: Earned income credit .....	1,400.00
Net income subject to normal tax .....	\$58,216.33
Normal tax at 4% on \$58,216.33 .....	\$ 2,328.65
Surtax on \$59,616.33 .....	16,011.19

Total normal tax and surtax .....	\$18,339.84
Defense tax (10% of \$18,339.84) .....	1,833.98
<hr/>	
Total income tax .....	\$20,173.82
Correct income tax liability .....	\$20,173.82
Income tax assessed:	
Original, account No. 202505 .....	18,276.19
<hr/>	
Deficiency of income tax .....	\$ 1,897.63

### Adjustments to Net Income

#### Taxable Year Ended December 31, 1941

Net income as disclosed by return .....	\$64,349.14
Additional income and unallowable deductions:	
(a) Depreciation disallowed .....	\$ 601.18
(b) Long-term capital loss disallowed .....	688.47
(c) Trust income .....	1,702.23
(d) Interest disallowed .....	180.93
(e) Taxes disallowed .....	168.57
<hr/>	
Total .....	\$67,690.52
Additional deduction:	
(f) Ranch loss .....	898.72
<hr/>	
Net income adjusted .....	\$66,791.80

### Explanation of Adjustments

(a) The deduction of \$750.38 claimed in your return for depreciation on warehouse is \$25.38 in excess of the amount allowable under the provisions of section 23(1) of the Internal Revenue Code, and similarly the deduction of \$1,059.23 claimed for depreciation on property used in "Goodhue's" business is excessive in the amount of \$575.80.

(b) Your community half of long-term capital loss from the sale of 700 shares of Citizens National Trust and Savings Bank Stock has been determined as \$7,287.95, in lieu of \$7,976.42 claimed in your return.

(c) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1" .....	\$23,311.10	\$22,977.17	\$(333.93)
"Chandler Trust No. 2" .....	10,527.69	12,563.85	2,036.16
<hr/>		<hr/>	
Total .....	\$33,838.79	\$35,541.02	\$1,702.23

(d) The deduction claimed for interest is overstated \$180.93.

(e) The deduction claimed for taxes is overstated \$168.57.

(f) A deduction of \$1,040.67 is allowed for your community half of ranch loss, in lieu of \$141.95 claimed in your return.

### Computation of Alternative Tax

Taxable Year Ended December 31, 1941

Net income adjusted .....	\$66,791.80
Plus: Net long-term capital loss .....	10,496.50
Ordinary net income .....	\$77,288.30
Less: Personal exemption .....	\$ 1,500.00
Credit for dependents .....	433.33    1,933.33
Balance (surtax net income) .....	\$75,354.97
Less: Earned income credit .....	1,400.00
Net income subject to normal tax .....	\$73,954.97
Normal tax at 4% on \$73,954.97.....	\$ 2,958.20
Surtax on \$75,354.97 .....	34,246.53
Partial tax .....	\$37,204.73
Minus: 30% of net long-term capital loss .....	3,148.95
Alternative tax .....	\$34,055.78

### Computation of Tax

Taxable Year Ended December 31, 1941

Net income adjusted .....	\$66,791.80
Less: Personal exemption .....	\$ 1,500.00
Credit for dependents .....	433.33    1,933.33
Balance (surtax net income) .....	\$64,858.47
Less: Earned income credit .....	1,400.00
Net income subject to normal tax .....	\$63,458.47
Normal tax at 4% on \$63,458.47.....	\$ 2,538.34
Surtax on \$64,858.47 .....	27,946.50
Total .....	\$30,484.84
Alternative tax .....	\$34,055.78
Correct income tax liability .....	\$34,055.78
Income tax assessed:	
Original, account No. 381075 .....	32,709.01
Deficiency of income tax .....	\$ 1,346.77

Received and filed Sept. 27, 1943, T.C.U.S.



(Title of Tax Court and Cause.)

Docket No. 3033.

### ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar years 1938 to 1941, inclusive, but denies that the total of the proposed deficiencies aggregating \$26,802.62 is in controversy; denies the remainder of the allegations contained in paragraph 3 of the petition.

4. (a) to (e), inclusive. Denies that the respondent erred as alleged in subparagraphs (a) to (e), inclusive, of paragraph 4 of the petition.

5. (a) and (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraphs 5 of the petition.

(c). Admits that petitioner in her income tax return for 1938 reported \$8,597.49 as income from Trust No. 2. Admits that respondent determined that the amount reportable by petitioner from said source was \$11,446.46, and accordingly increased the taxable net income reported by petitioner by \$2,-



848.97. Denies that respondent's determination was erroneous and denies the remaining allegations contained in subparagraph (c) of paragraph 5 of the petition.

(d). Admits that petitioner in her income tax return for 1939 reported \$8,389.89 as income from Trust No. 2. Admits that respondent determined that the amount reportable by petitioner from said source was \$12,418.07, and accordingly increased the taxable net income reported by petitioner by \$4,028.18. Denies that respondent's determination was erroneous and denies the remaining allegations contained in subparagraph (d) of paragraph 5 of the petition.

(e). Admits that petitioner in her income tax return for 1940 reported \$9,385.93 as income from Trust No. 2. Admits that respondent determined that the amount reportable by petitioner from said source was \$13,413.67, and accordingly increased the taxable net income reported by petitioner by \$4,027.74. Denies that respondent's determination was erroneous and denies the remaining allegations contained in subparagraph (e) of paragraph 5 of the petition.

(f). Admits that petitioner in her income tax return for 1941 reported \$10,527.69 as income from Trust No. 2. Admits that respondent determined that the amount reportable by petitioner from said source was \$12,563.85, and accordingly increased the taxable net income reported by petitioner by \$2,-

036.16. Denies that respondent's determination was erroneous and denies the remaining allegations contained in subparagraph (f) of paragraph 5 of the petition.

(g). Denies the allegations contained in subparagraph (g) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,  
Chief Counsel, Bureau of  
Internal Revenue.

Of Counsel:

B. H. NEBLETT,  
Division Counsel.

HAROLD D. THOMAS,  
Special Attorney,  
Bureau of Internal Revenue.

Received and filed Nov. 17, 1943. T. C. U. S.

[Title of Tax Court and Causes.]

Docket Nos. 3033, 3036, 3037, 3038, 3039, 3040, and 3041.

### STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, as follows:

(1) Chandler Trust No. 2 was created on June 26, 1935, by the execution of a Trust Agreement, a photostat copy of which is attached hereto, marked "Exhibit 1-A" and made a part hereof. At no time since its execution has said Trust Agreement been altered, amended or modified.

(2) At the time said Trust Agreement was executed, one of the Trustors, Marian Otis Chandler, conveyed to the Present Trustees and their successors two certificates representing 16,536 shares of stock of Chandis Securities Company; and each of the other seven Trustors conveyed to the Present Trustees and their successors a certificate representing 50 shares of stock of The Times-Mirror Company and two certificates representing 2,694 shares of stock of Chandis Securities Company.

(3) Said certificates of stock were endorsed by the respective Trustors on June 27, 1935, and delivered to The Times-Mirror Company and Chandis Securities Company for cancellation, and a new certificate representing 350 shares was issued by The Times-Mirror Company and a new certificate

representing 35,394 shares was issued by Chandis Securities Company in the names of and delivered to the Trustees on June 27, 1935. From that date to the present time, said certificates have been kept by the Trustees.

(4) The total property owned by the trust during the taxable years consisted of (a) a small amount of principal cash (\$607.83 during 1938 and 1939, and \$7.83 during 1940 and 1941), (b) 350 shares of stock of The Times-Mirror Company, (c) 35,394 shares of common stock of Chandis (Securities Company), and (d) shares of preferred stock of Chandis (Securities Company) as follows: December 31, 1937, 884 shares; December 31, 1938, 1,591 shares; December 31, 1939, 2,304 shares; December 31, 1940, 3,011 shares; and December 31, 1941, 3,541 shares.

(5) The gross cash receipts and expenditures of the trust for each of the taxable years were as follows:

Gross Cash Receipts	1938	1939	1940	1941
Dividends on Times-Mirror Co. stock.....	\$26,950.00	\$32,375.00	\$35,000.00	\$35,000.00
Dividends on Chandis Securities Co. stock	62,918.30	54,343.81	62,501.23	77,692.39
Total .....	\$89,868.30	\$86,718.81	\$97,501.23	\$112,692.39
Expenditures				
Office Expense .....	\$ 303.40	\$ 295.80	\$ 299.86	\$ 295.80
California State Income Tax .....	6,292.03	4,420.00	4,420.00	4,617.76
Total .....	\$ 6,595.43	\$ 4,715.80	\$ 4,719.86	\$ 4,913.56
Net .....	\$83,272.87	\$82,003.01	\$92,781.37	\$107,778.83

The office expenses set forth above represented compensation paid for part-time clerical services in keeping the trust's books and records.

(6) During the taxable years the trust received, as taxable stock dividends on its Chandis Securities Company common stock, the following number of shares of Chandis Securities Company preferred stock: 1938—707 shares; 1939—707 shares; 1940—707 shares; 1941—530 shares; which shares had a fair market value equal to their par value, or \$70,-700.00 for the shares received during each of the first three years and \$53,000.00 for the shares received during the year 1941. Attached hereto as "Exhibit 2-B" and "Exhibit 3-C," respectively, are a photostat copy of the minutes of the meeting of the Board of Directors of Chandis Securities Company held on December 6, 1937, and a copy of one of the letters, dated September 20, 1937, referred to therein.

(6a) Respondent does not admit or concede by anything contained in this stipulation that there was in fact a valid trust and no statement herein contained shall be construed to mean that a valid trust existed.

(7) The net cash income distributable and distributed under the terms of the Trust Agreement to the respective beneficiaries, reported by said beneficiaries in their respective Federal income tax returns and upon which they paid individual income taxes, was as follows:

	1938	1939	1940	1941
Marian O. Chandler..	\$26,442.77	\$23,273.78	\$27,079.86	\$ 34,085.00
May C. Goodan.....	8,118.59	8,389.89	9,385.93	10,527.69
Ruth C. Williamson..	8,118.59	8,389.89	9,385.93	10,527.69
Helen C. Garland.....	8,118.59	8,389.89	9,385.93	10,527.69
Harrison Chandler ..	8,118.59	8,389.89	9,385.93	10,527.69
Philip Chandler .....	8,118.57	8,389.89	9,385.93	10,527.69
Norman Chandler ....	8,118.59	8,389.89	9,385.93	10,527.69
Constance C. Crowe..	8,118.58	8,389.89	9,385.93	10,527.69
Totals .....	\$83,272.87	\$82,003.01	\$92,781.37	\$107,778.83

(8) During each of the taxable years the trust paid the following Federal income taxes with cash contributed therefor by the petitioners in accordance with their respective interests in the trust:

1938—\$27,220.00  
 1939—\$17,942.00  
 1940—\$17,942.00  
 1941—\$26,404.00

Said income taxes were computed on the taxable stock dividends received by the trust during the preceding year.

(9) The following table shows the relationships and the ages at June 26, 1935, of the individuals named in Article IV of the Trust Agreement:

Name	Relationship	Ages at 6/26/35
Marian Otis Chandler		68
May C. Goodan.....	Daughter	42
Constance Chandler .....	Daughter	39
Ruth C. Williamson.....	Daughter	37
Harrison G. O. Chandler....	Son	32
Norman Chandler .....	Son	35
Helen C. Garland.....	Daughter	28
Philip Chandler .....	Son	28

Name	Relationship	Ages at 6/26/35
Harry C. Kirkpatrick.....	Son of Frances C. Kirkpatrick, deceased daughter of Marian Otis Chandler	16
Marian Kirkpatrick .....	Daughter of Frances C. Kirkpatrick, deceased daughter of Marian Otis Chandler	12
Ruth C. Goodan .....	Daughter of May C. Goodan	18
William Goodan .....	Son of May C. Goodan	16
Douglas Goodan .....	Son of May C. Goodan	12
Jean Goodan .....	Daughter of May C. Goodan	8
Camilla Chandler .....	Daugh. of Norman Chandler	10
Otis Chandler .....	Son of Norman Chandler	7
Warren B. Williamson ....	Son of Ruth C. Williamson	6
Chandler Williamson ....	Son of Ruth C. Williamson	5
Susan Williamson .....	Daugh. of Ruth C. Williamson	5
Norman B. Williamson ....	Son of Ruth C. Williamson	3
Gwendolyn Garland .....	Daugh. of Helen C. Garland	2 mo.

(10) All of said individuals are living at the present time except Chandler Williamson, who died in June, 1943.

(11) At a meeting held by the Trustees on June 26, 1935, Marian Otis Chandler was chosen Chairman and Constance C. Crowe was chosen Secretary of the trust, which positions they still occupy.

(12) The principal business of The Times-Mirror Company is and since 1881 has been the publication of "The Los Angeles Times," a newspaper with daily morning and Sunday editions. It has one class of stock, of which 5,760 shares were outstanding during the taxable years and for more than ten years prior to June 26, 1935. At all times since 1884 a majority of the stock of The Times-Mirror Company has been owned, directly or indirectly, by the father of Marian Otis Chandler, General



Harrison Gray Otis, and his descendants. Immediately prior to the creation of the trust on June 26, 1935, shares of stock of The Times-Mirror Company were owned as follows:

Name of Stockholder	No. Shares
Marian Otis Chandler .....	1,634
May C. Goodan .....	50
Ruth C. Williamson .....	50
Helen C. Garland .....	50
Harrison G. O. Chandler .....	50
Philip Chandler .....	50
Constance Chandler .....	50
Norman Chandler .....	100
Estate of Frances C. Kirkpatrick .....	50
Harry Chandler .....	3
Chandis Securities Company .....	1,935
Others .....	1,738
Total.....	5,760

(13) Chandis Securities Company, which was a personal holding company during the years involved herein, was organized in 1916. On June 25, 1935, its outstanding stock consisted of 38,288 shares of common stock. Of these, Marian Otis Chandler owned 16,536 shares, her seven living children and the estate of her deceased daughter each owned 2,694 shares, and Harry Chandler owned 200 shares. Preferred stock of Chandis Securities Company was first authorized and issued in 1937, and on December 31, 1941, there were 5,954 shares of such preferred stock outstanding.

(14) In the event it is finally determined that the stock dividends are not taxable to the petitioners, the parties hereby stipulate and agree that there



are deficiencies or overpayments in Petitioners' income taxes for the taxable years as follows, and that the Court may enter its decisions accordingly (Note: parentheses represent overpayments):

Taxpayers	1938	1939	1940	1941
May C. Goodan .....	\$ 317.48	\$20,482.24	(\$50.91)	\$ 240.32
Marian Otis Chandler..	21,301.69	42.61	184.38	626.45
Norman Chandler .....	4,592.52	918.09	1,218.56	1,840.23
Philip Chandler .....	(13.79)	407.21	300.00	1,209.86
Constance C. Crowe ....	1,577.88	938.28	1,286.73	700.51
Helen C. Garland .....	133.03	59.22	582.38	16.20
Ruth C. Williamson ....	96.65	1,583.92	(48.66)	234.79

It is further stipulated and agreed, and the Court may find as part of its decisions, that the deficiencies in amounts above stated were paid by the respective petitioners to the Collector of Internal Revenue at Los Angeles, California, on December 31, 1946, with the following exceptions: in the case of May Chandler Goodan part payment of the deficiencies for the years 1938 and 1939 were made on June 30, 1944, in the amounts of \$236.42 and \$20,294.44, respectively, and the deficiency for 1941 has not been paid; in the case of Philip Chandler the deficiencies for the years 1939 to 1941 in the total amount of \$1,917.07 have been reduced by the overpayment for the year 1938 of \$13.79 and the net amount of \$1,903.28 was paid on December 31, 1946; and in the case of Ruth Chandler Williamson deficiencies for the years 1938, 1939 and 1941, less an overpayment for the year 1940, were paid on December 31, 1946, as follows:

1938 .....	\$ 96.65
1939 .....	5,290.50
1941 .....	234.79
	<hr/>
	\$5,621.94
1940 .....	48.66
	<hr/>
Net amount paid .....	<u><u>\$5,573.28</u></u>

It is further stipulated and agreed, and the Court may find as part of its decisions, that the overpayments above stated were made within three years before the mailing of the notices of deficiency or the filing of the petitions or the execution of consents under the provisions of section 276(b) of the Internal Revenue Code or the Revenue Act of 1938, and that the notices of deficiency were mailed, the petitions were filed, or the consents were executed within three years from the time the returns were filed. (Section 322(d) of the Internal Revenue Code and the Revenue Act of 1938, as amended by Section 169(b) of the Revenue Act of 1942 and Section 509 of the Revenue Act of 1943).

(15) It is further stipulated and agreed that in the event it is finally determined that said stock dividends are taxable to the petitioners, there are deficiencies in income tax, and the Court may enter its decisions, as follows:

Taxpayers	1938	1939	1940	1941
May C. Goodan .....	\$1,576.30	\$23,616.73	\$2,840.34	\$2,870.16
Marian O. Chandler .....	41,554.13	13,165.50	19,354.75	15,314.93
Norman Chandler .....	6,698.41	3,307.41	4,340.27	4,551.00
Philip Chandler .....	1,180.61	1,657.10	2,665.96	3,596.95
Constance C. Crowe .....	2,942.21	2,398.13	3,726.33	3,006.68
Helen C. Garland .....	1,329.88	1,394.51	2,815.69	2,230.25
Ruth C. Williamson .....	1,635.51	3,188.12	2,613.58	2,864.63

The Court may also find that a portion of said deficiencies has been paid by the respective petitioners, in amounts set forth hereinabove.

(16) It is further stipulated and agreed that there is no penalty liability under Section 293(a) of the Revenue Act of 1938 for the taxable year 1938 in the case of petitioner Norman Chandler, Docket No. 3037.

Dated April 26, 1948.

/s/ CALDER MACKAY,

/s/ ARTHUR MCGREGOR,

/s/ HOWARD W. REYNOLDS,

/s/ ADAM Y. BENNION,

/s/ WILLIAM GALBALLY, JR.,

(Representing May Chandler Goodan), Counsel for  
Petitioners.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of Internal Revenue, Coun-  
sel for Respondent.

Filed at hearing April 26, 1948. T. C. U. S.

(Title of Tax Court and Causes).

Docket Nos. 3033, 3036, 3037, 3038, 3039, 3040, 3041.

Promulgated May 23, 1949.

In 1935 eight individuals transferred individually-owned stock in two corporations in trust and directed the trustees to pay their pro rata share of trust income to themselves for life, then to their respective spouses, then to their issue, and then to their heirs until termination of the trust, at which time the trust corpus was to go to their issue, if any, and then to their heirs-at-law. The trust was to terminate upon the death of the survivor of 21 named individuals ranging in age from 68 years to two months and including the eight trustors. Each trustor reserved a power of appointment of his share of trust income and principal after his death. Cash net income was to be, and was, distributed to the life tenant-trustors during the taxable years and the income tax due thereon was paid by them. Taxable stock dividends received by the trust during each of the taxable years was reported as trust income and the income tax paid thereon. A provision of the trust agreement required stock dividends to inure to principal. Respondent determined that the taxable stock dividends constituted income to the life tenant-trustors for the reason that no valid trust was created, or sections 22(a), 166, or 167 of the Revenue Act of 1938 and the Internal Revenue Code applied. Held, the trust created herein was a valid trust under the laws of California, following

Bixby v. California Trust Co., 190 P. (2d) 521,  
and Gray v. Union Trust Co. 154 P. 306.

Held, further, sections 22(a), 166 and 167, *supra*,  
are inapplicable, following *Commissioner v. Bateman*,  
127 Fed. (2d) 266, affirming 43 B. T. A. 69, and dis-  
tinguishing *Helvering v. Clifford*, 309 U. S. 331.

WILLIAM GALBALLY, JR., Esq.,  
A. CALDER MACKAY, Esq.,  
ADAM Y. BENNION, Esq.,  
For the Petitioners.

B. H. NEBLETT, Esq.,  
For the Respondent.

## OPINION

Arnold, Judge:

These consolidated cases involve income tax de-  
ficiencies as follows:

Docket No.	Petitioner	1938	1939	1940	1941
3033—	May C. Goodan .....	\$ 948.67	\$22,609.55	\$1,897.63	\$1,346.77
3036—	Marian O. Chandler.....	65,870.01	8,995.62	14,114.00	7,755.73
3037—	Norman Chandler .....	5,861.44	3,162.91	4,506.34	9,382.14
3038—	Philip Chandler .....	1,263.65	1,577.23	1,933.15	2,251.08
3039—	Constance C. Crowe....	2,456.66	2,066.75	3,106.89	1,866.62
3040—	Helen C. Garland.....	1,138.18	1,028.68	2,084.37	935.39
3041—	Ruth C. Williamson ....	937.67	2,658.92	1,737.50	691.24

The parties stipulated that there is no penalty  
liability under section 293(a), Revenue Act of 1938,  
for the taxable year 1938 in Docket No. 3037.

Numerous issues have been settled by the parties  
with the result that a single issue, common to each

case for each taxable year, remains for decision, namely, whether certain taxable stock dividends received by a trust are taxable to the trust or to its grantors, seven of whom are petitioners herein.

The parties have stipulated the amount of the deficiency in each case for each taxable year if we decide the sole issue in favor of the respondent. The parties have also stipulated the amount of the deficiency or overpayment in each case for each taxable year if we decide the sole issue in favor of the petitioners. The parties have stipulated all facts deemed pertinent hereto. Their stipulation is incorporated herein by reference and the pertinent facts hereinafter summarized.

The income tax returns for the years involved herein were filed with the collector of internal revenue for the sixth district of California.

The trust involved herein, Chandler Trust No. 2, was created on June 26, 1935, by the execution of a trust agreement. The petitioners herein and Harrison G. O. Chandler executed the agreement as trustors and as trustees. At no time since its execution has the trust agreement been altered, amended or modified.

Marian Otis Chandler is the mother of Harrison G. O. Chandler and the other six petitioners. At June 26, 1935 she was 68 years of age, her children ranged from 42 to 28 years of age, and her 13 grandchildren from 18 years to two months. All of the said individuals are living at the present time, except one grandchild, who died in June, 1943.

At the time the trust agreement was executed

Marian Otis Chandler conveyed to the present trustees and their successors 16,536 shares of stock of Chandis Securities Company, hereinafter referred to as Chandis. Each of the other seven trustors conveyed to the present trustees and their successors a certificate representing 50 shares of stock of The Times-Mirror Company, hereinafter referred to as The Times, and two certificates representing 2,694 shares of stock of Chandis.

The certificates of stock were endorsed by the respective trustors on June 27, 1935 and delivered to The Times and Chandis for cancellation. A new certificate representing 350 shares was issued by The Times and a new certificate representing 35,394 shares was issued by Chandis in the names of, and delivered to, the trustees on June 27, 1935. From that date to the present time, the trustees have kept the certificates.

The trust indenture, after specifically naming petitioners and Harrison G. O. Chandler as "the Trustors," as "the 'present Trustees' " and as "the 'present beneficiaries'," provides in part and in summary as follows:

Witnesseth

That, Whereas the Trustors deem it to be for their best interest, and for the best interests of The Times-Mirror Company and the Chandis Securities Company, that there should be a continuity and stability of policy and management, and to that end that the interests of each of the Trustors in said corporations, as evidenced by



the stock severally held by them, be united and vested in the Trustees, as hereinafter provided; and

Whereas, the Trustors deem it also to be for their best interests that there should be held, conserved, administered and eventually distributed, according to the terms hereof, those assets which are respectively contributed by them to the Trust Estate;

\* \* \*

Article I of the trust indenture segregates the trust corpus into two parts. It provides that one part

\* \* \* shall consist of all of the shares of capital stock of The Times-Mirror Company delivered to the Trustees hereunder, and the other part shall consist of all of the shares of the capital stock of Chandis Securities Company delivered to the Trustees hereunder, and such division and segregation shall be continued throughout the term of this trust.

The legal and equitable title to the trust estate was vested in the trustees and no interest therein "is, or at any time shall be, deemed to be vested in any of the beneficiaries hereunder. The interests of the beneficiaries shall at all times consist only and solely of the right to enforce the due performance of this trust."

Article II deals with the gross income from the trust. It provides that gross income from each divi-



sion of the trust estate (The Times stock and the Chandis stock) shall be charged with the taxes, costs, charges and expenses applicable to administering, protecting and distributing that portion of the trust estate. General and indirect costs, charges and expenses were to be allocated to the two parts as the trustees determined.

Article III deals with the distribution of the net income. It provides that the "entire net income received from the trust estate and available in cash for distribution, shall be paid in monthly, quarterly, or other convenient installments" as the trustees may from time to time determine the net income from The Times stock to be distributed in equal shares to the seven individuals who contributed that stock and the net income from the Chandis stock to be distributed during their lives, 16,536/35,394 to Marian Otis Chandler and 2,694/35,394 to each of the other seven trustors.

Article III also provides as follows:

There is hereby expressly reserved to each of the Trustors, during his or her lifetime, the absolute power of appointment and disposition of his or her share of the principal and income of the Trust Estate after his or her death, the same to be exercised not by Will, but only by the last written instrument exercising such power on file with the Trustees at such Trustor's death. Such power may be exercised, but only in the manner herein specified, from time to

time, and each exercise thereof may be similarly revoked.

Failing such appointment and disposition so on file at the time of trustor's death, the trust income to which a deceased trustor would have been entitled is to be distributed to his or her spouse for life, then to their issue, if any, then to the living heirs of such trustor, during their respective lives until termination of the trust. Similarly, the trustor's share of principal upon termination of the trust is vested in and distributed to his or her then living issue in equal shares, per stirpes, if none survived then to the living heirs-at-law, the identity and respective shares of which is to be determined by California law in force at the time of the trustor's death.

Article IV provides that the trust "shall cease upon, and in no event shall its duration extend beyond, the death of the last survivor of the following named persons, \* \* \*." The 21 persons named in the trust indenture were the eight trustors and 13 grandchildren, whose ages ranged from 68 years to two months, as above mentioned.

Article V, entitled "As to Trustees," provides that when the "present Trustees" shall have been reduced to three in number, the survivors shall appoint and constitute additional trustees, so that there shall always be, except for temporary vacancies, seven trustees until the termination of the trust. The additional trustees were to be selected, so far

as possible, from the then beneficiaries of the trust, "giving preference to those who may be executives of" The Times and Chandis, "so long as shares of stock of the respective companies are held in the Trust Estate." Other persons, including a bank or trust company, could be selected as additional trustees, but a majority of the trustees who were at the same time beneficiaries, could remove any or all of such other persons. Long continued absence from California or the County of Los Angeles, incapacity or inability to act constituted a valid reason for removal of any trustee by the remaining trustees, whether a beneficiary or not. Except in instances where unanimity or determination by trustees who are also beneficiaries is specifically provided, the decision of a majority of the trustees shall be deemed the decision of all. The trustees shall choose from their number a chairman and a secretary, one or more special custodians of funds or property, and one or more for the collection and disbursement of funds of the trust estate. The trustees were authorized to appoint other agents, depositaries, auditors, advisers, brokers, attorneys and other consultants. They were required to adopt rules of procedure for their meetings, keep records thereof, fix regular places and times for meetings with provision for notice thereof, all as they may from time to time determine in the efficient administration of the trust estate. The books of account, minutes of meetings and other records of the trust were to be subject to inspection to such extent as the trustees may from time to time determine.

Article VI, entitled "Powers of the Trustees", provides as follows:

The Trustees are specifically empowered to receive and collect the principal and income of the Trust Estate, invest and reinvest the principal available therefor, and as hereinabove provided, to pay, accumulate, use and apply the income, and at the termination of the trust, to distribute the principal of the Trust Estate.

To carry out the express purposes of this trust, and in aid of its execution, and the proper administration, management and distribution of the Trust Estate, the Trustees are vested with the following additional powers and discretions:

(1) The shares of stock The Times Mirror Company, hereinabove described, and the shares of stock of Chandis Securities Company, hereinabove described, shall be sold, exchanged or otherwise disposed of only by the unanimous decision of the present or succeeding Trustees herein named; after the present and succeeding Trustees herein named are reduced to three in number, by the unanimous decision of the Trustees who are then beneficiaries hereunder;

(2) Similar unanimity shall be required for a determination of the Trustees to borrow upon or pledge, or in any manner hypothecate or alienate or transfer or otherwise dispose of any interest in or to said shares. No portion, or less than the entire number of said shares, shall be sold, pledged, or otherwise disposed of, except in the event of such emer-

gency that such partial disposition shall serve to avert the loss of the whole, or to protect the remaining shares.

In aid of the determination to be arrived at by the Trustees in the situations herein contemplated, it is the Trustors' desire and request that the powers herein conferred, which are contingent upon the unanimous decision of the Trustees, shall be exercised only to maintain such a proportionate interest as is now represented in The Times Mirror Company and Chandis Securities Company, or in the event of an emergency, to protect as much thereof as may be possible under such circumstances;

(3) It being the desire of all the parties hereto that Norman Chandler shall eventually succeed to the position of President and General Manager of The Times Mirror Company, the Trustees shall vote said shares for such Directors as will carry out this desire. The unanimous decision of the Trustees shall be required in order to vote for such Directors as will not choose Norman Chandler as the President and General Manager of the Times Mirror Company, but if it should be unanimously determined that some one other than Norman Chandler shall be President and General Manager of The Times Mirror Company, then a decision by a majority of the Trustees shall be sufficient to choose his successor;

(4) The unanimous decision of all of the Trustees shall be requisite to exercise the following powers with reference to the stock of The Times Mirror

Company and Chandis Securities Company, so long as it shall constitute a part of the Trust Estate:

(a) To vote for any increase of capitalization of The Times Mirror Company and/or Chandis Securities Company, which increase is proposed to be sold to the stockholders, or others, and not issued by way of stock dividend;

(b) To vote for or consent to the incurring of any bonded indebtedness or other long term loan which requires the approval of stockholders, or shall be submitted to them;

(c) To vote for or consent to any new classes of stock, or any reclassification of stock which might vary the rights of stockholders as to voting or other preferences;

(d) To enter into any voting trust or other lawful agreement with other stockholders for the purpose of concentrating or unifying the control of stock of The Times Mirror Company and/or Chandis Securities Company, and to deposit shares under such agreement;

(5) The Trustees, if the shares of stock of The Times Mirror Company and/or Chandis Securities Company should be sold or otherwise disposed of, or if there should be any liquidation, partial or otherwise, of the assets thereof, or a distribution to the stockholders thereof of any proceeds of sale as a result of which assets of substantially different character are received by the Trustees, then and in that



event, but not otherwise, are vested with the following additional powers and discretions:

(a) To retain such property and to continue to operate any business in connection therewith for such time as the Trustees may deem advisable or expedient;

(b) To manage, control, sell, convey, exchange, or otherwise dispose of, or partition, divide, sub-divide, improve or repair such property and in connection with its disposal, to grant options and to sell upon deferred payments;

(c) To borrow upon, mortgage, pledge, or otherwise encumber such property;

(d) To lease such property, or any part thereof, for terms extending beyond the duration of this trust, and to grant for like terms the right to mine, or drill for and remove therefrom gas, oil and other minerals;

(e) Respecting bonds, shares of stock and other securities, notes, accounts and other choses in action, to have and exercise all the rights, powers and privileges of an owner, including (though without limiting the foregoing) voting, giving of proxies, payments of assessments and other sums deemed by the Trustees to be expedient for the protection thereof, assenting to corporate sales, leases and encumbrances, participating in voting trusts and

pooling agreements, selling or exercising stock subscription or conversion rights, participating in foreclosures, reorganizations, mergers and liquidations, and in connection therewith depositing securities with protective or other committees, on such terms as the Trustees may deem expedient; to sue upon or otherwise enforce collection of any note or other obligation, or to compromise any claim or demand based thereon;

(f) To invest such principal receipts as are in the form of cash in conservative securities to such an extent as the Trustees shall deem advisable or expedient, but such investment of cash shall not be limited to conservative securities if the Trustees shall deem that any one or more of the following courses shall better protect the Trust Estate, or shall be more conservative as providing for a greater diversification:

(1) To purchase property, whether real or personal, to such extent as the Trustees may deem expedient or desirable, as providing protection from the possibility of monetary disorders or securities devaluations or deflations, or monetary or other inflation, or to avert or lighten onerous taxes or other Governmental charges;

(2) To make such conservative loans or advances upon collateral or upon real estate for



such term, either within or extending beyond the duration of this trust and at such rate of interest as the Trustees may deem to be for the best interests of the Trust Estate;

The enumeration of those certain powers and discretions of the Trustees, as are set out in this Paragraph (5) shall not be construed as limiting the general powers and discretions herein vested in the Trustees, it being the intent of the Trustors that in the events provided for in this Paragraph, the Trustees shall have, and they are hereby vested with, all of the powers and discretions that an absolute owner of property has or may have.

(6) Regardless of the character of the Trust Estate, the Trustes shall have the following general powers and discretions:

(a) To determine in their discretion what is principal of the Trust Estate, gross income or net distributable income therefrom; except that all bonuses, royalties and recoveries from mines, gas or oil leases or wells, all stock dividends and proceeds of sale of stock rights and all gain or loss which may result from the payment, retirement or sale of stocks, notes, bonds or other securities, or on foreclosure or other realization upon mortgages and trust deeds, shall inure to or fall upon principal, and all cash dividends (other than liquidating dividends stated in writing to be such by the corporation paying the same, or proved to the satisfaction of the

Trustees to be such prior to its disbursement thereof) shall go to income of the Trust Estate. The net income from real property acquired by the Trustees on or by acceptance of conveyance in lieu of foreclosure, shall go to income of the Trust Estate. Brokers' or other commissions and expenses on purchase or sale of trust property shall be charged against principal;

(b) To hold property of the Trust Estate in their own names, or in the names of one or more of their number, or in the name of their nominee, with or without disclosing such fiduciary relationship;

(c) To appoint or employ servants, including agents, auditors, brokers, attorneys and other consultants and advisers, and provide for their compensation;

Any Trustee who is not a beneficiary may receive such reasonable compensation for his services as Trustee, as the remaining Trustees may agree upon at the time of his or its appointment. Any Trustee may be compensated for any special or extraordinary or unusual services if such compensation shall be agreed upon in advance of the rendition of such services;

(d) The Trustees may maintain and administer the Trust Estate undivided and as a unit, and shall not be required to make physical division or segregation thereof, except if, when and to the extent required to make distribution

thereof, as in this trust provided, but the Trust Estate shall be deemed to be theoretically divided into as many units as there are beneficiaries and in proportion to their respective interest in the income;

(e) To allot, partition and distribute the Trust Estate for such valuations and according to such method or procedure as the Trustees may determine upon, and to do so in kind, or partly in kind and partly in money, according to their valuation thereof;

(f) To construe this agreement, and the construction of the same made in good faith shall be final, conclusive and binding upon all beneficiaries;

All discretions in this trust conferred upon the Trustees shall, unless specifically limited, be absolute and their exercise shall be conclusive on all persons interested in this trust or the Trust Estate.

Article VII, entitled "Liabilities of the Trustees", specifies that the trustees assume no personal liabilities of the "Trustees", specifies that the trustees assume no personal liability in respect of any action taken by them, except for his, her, or its own gross negligence or willful misconduct. It also provides that any trustee may be a member, shareholder, director, officer or trustee of any other corporation, firm, trust or association with which the trustees may deal; may become pecuniarily interested in any matter or transaction to which the trustee may be a

party, provided the nature of such relationship is fully disclosed to the remaining trustees; may buy from, sell to, or deal with the trustees so long as a majority of all the trustees have notice of such interest of such trustee in the transaction and shall approve thereof. The trustees shall render to the beneficiaries an annual statement of receipts, disbursements and assets as soon after the close of the fiscal period as practicable. The approval of such account by the adult beneficiaries competent to act constitutes a full and complete acquittance and discharge of the trustees as to the transactions, receipts and disbursements reflected therein.

Article VIII is entitled "As to Beneficiaries." It contains provisions restraining each beneficiary from alienating, anticipating, encumbering or in other manner assigning his or her interest, and other provisions common to so-called spendthrift trusts. It also provides in part as follows:

If any beneficiary shall, either directly or indirectly, singly or in conjunction with other persons, seek to establish or assert any claim to the Trust Estate or to the income therefrom except as it herein specifically provided, or shall attempt to impair, invalidate or set aside any of the provisions hereof, or to have the same or any part thereof declared void or diminished, or to defeat or change any part of the plan of administration and distribution, as contemplated hereby, or shall attempt to settle or compromise, directly or indirectly, either in or out of

court, with any persons seeking so to do, or shall consent or acquiesce in, or fail to contest such proceedings, then and in that event, anything to the contrary hereinabove stated notwithstanding, such person or persons shall thereupon cease to have any further interest or estate hereunder and the interest or share which would otherwise have gone to such person or persons shall go to augment the share or shares of those who shall not have joined in, assisted, consented to or acquiesced in such proceedings.

The beneficiaries hereunder shall have no control or authority over the Trustees in any particular whatsoever, their entire interest hereunder being to receive the income, and at the termination of this trust, the principal, in the manner and to the extent determined by the Trustees. The acts of the Trustees and the powers and discretions herein vested, shall, except for lack of good faith, be conclusive upon all beneficiaries hereunder.

Article IX is entitled "General Provisions". It provides that persons dealing with the trustees shall not be required to see to the application of the purchase money or other consideration passing to the trustees and were not required to see that the terms of the trust were complied with. The provisions of the trust agreement are declared to be severable, and the adjudged invalidity of any provision was not to effect the remaining provisions of the trust agreement. The concluding paragraph of Article IX provided as follows:

This agreement and each and every provision hereof shall be, and is hereby, declared to be irrevocable and cannot be terminated by the parties hereto, by the beneficiaries hereunder, or by any court or otherwise, prior to the expiration of its full term, as herein fixed;

Provided, however, that the Trustors, during their joint lives, have reserved, and do hereby reserve, the right by their unanimous agreement in writing and filed with the Trustes to modify, amend, construe, define or otherwise vary the terms of the provisions of Articles II, III, V, VI, VII and IX hereof, but no such modification shall be effective, directly or indirectly, to change the provisions as to the duration of this trust or the initial character of the Trust Estate, as provided in Articles I, IV, and VIII, the provisions of which last numbered Articles shall be in all respects and in each and every provision thereof be and remain irrevocable.

The total property owned by the trust during the taxable years consisted of (a) a small amount of principal cash (\$607.83 during 1938 and 1939, and \$7.83 during 1940 and 1941), (b) 350 shares of stock of The Times, (c) 35,394 shares of common stock of Chandis, and (d) shares of preferred stock of Chandis as follows:

December 31, 1937 .....	884 shares
December 31, 1938 .....	1,591 shares
December 31, 1939 .....	2,304 shares
December 31, 1940 .....	3,011 shares
December 31, 1941 .....	3,541 shares



The gross cash receipts and expenditures of the trust for each of the taxable years were as follows:

Gross Cash Receipts	1938	1939	1940	1941
Dividends on Times stock .....	\$26,950.00	\$32,375.00	\$35,000.00	\$ 35,000.00
Dividends on Chandis stock ....	62,918.30	54,343.81	62,501.23	77,692.39
Total .....	\$89,868.30	\$86,718.81	\$97,501.23	\$112,692.39
Expenditures				
Office expense .....	\$ 303.40	\$ 295.80	\$ 299.86	\$ 295.80
California State Income Tax .....	6,292.03	4,420.00	4,420.00	4,617.76
Total .....	\$ 6,595.43	\$ 4,715.80	\$ 4,719.86	\$ 4,913.56
Net .....	\$83,272.89	\$82,003.31	\$92,781.37	\$107,778.83

The office expenses set forth above represented compensation paid for part time clerical services in keeping the trust's books and records.

During the taxable years the trust received, as taxable stock dividends on its Chandis common stock, the following number of shares of Chandis preferred stock, which had a fair market value equal to its par value:

Year	Number of Preferred Shares	Fair Market Value
1938.....	707	\$70,000.00
1939.....	707	70,700.00
1940.....	707	70,700.00
1941.....	530	53,000.00

The trust reported the taxable stock dividends and paid income taxes during each of the taxable years as follows:

1938.....	\$27,220.00
1939.....	17,942.00
1940.....	17,942.00
1941.....	26,404.40

The income taxes were paid with cash contributed by petitioners in accordance with their respective interests in the trust.

The net cash income distributable and distributed under the terms of the trust agreement to the respective beneficiaries, reported by the beneficiaries in their respective income tax returns and upon which they paid individual income taxes, was as follows:

	1938	1939	1940	1941
Marian O. Chandler .....	\$26,442.77	\$23,273.78	\$27,079.86	\$ 34,085.00
May C. Goodan .....	8,118.59	8,389.89	9,385.93	10,527.69
Ruth C. Williamson .....	8,118.59	8,389.89	9,385.93	10,527.69
Helen C. Garland .....	8,118.59	8,389.89	9,385.93	10,527.69
Harrison Chandler .....	8,118.59	8,389.89	9,385.93	10,527.69
Philip Chandler .....	8,118.57	8,389.89	9,385.93	10,527.69
Norman Chandler .....	8,118.59	8,389.89	9,385.93	10,527.69
Constance C. Crowe .....	8,118.58	8,389.89	9,385.93	10,527.69
Totals .....	\$83,272.87	\$82,003.01	\$92,781.37	\$107,778.83

The principal business of The Times is, and since 1881 has been, the publication of "The Los Angeles Times", a newspaper with daily morning and Sunday editions. It has one class of stock, of which 5,760 shares were outstanding during the taxable years and for more than 10 years prior to June 26, 1935. At all times since 1884 a majority of the stock of The Times has been owned, directly or indirectly, by the father of Marian Otis Chandler, General Harrison Gray Otis, and his descendants. Immedi-



ately prior to the creation of the trust on June 26, 1935, shares of stock of The Times were owned as follows:

Name of Stockholders	No. Shares
Marian Otis Chandler .....	1,634
May C. Goodan .....	50
Ruth C. Williamson .....	50
Helen C. Garland .....	50
Harrison G. O. Chandler .....	50
Philip Chandler .....	50
Constance Chandler .....	50
Norman Chandler .....	100
Estate of Frances C. Kirkpatrick .....	50
Harry Chandler .....	3
Chandis Securities Company .....	1,935
Others .....	1,738
Total.....	5,760

Chandis, which was a personal holding company during the years involved herein, was organized in 1916. On June 25, 1935, its outstanding stock consisted of 38,288 shares of common stock. Of these, Marian Otis Chandler owned 16,536 shares, her seven living children and the estate of her deceased daughter each owned 2,694 shares, and Harry Chandler owned 200 shares. Preferred stock of Chandis was first authorized and issued in 1937, and on December 31, 1941, there were 5,954 shares of such preferred stock outstanding. The purpose of Chandis in authorizing and issuing taxable stock dividends during the taxable years was to enable it to obtain dividends paid credits and at the same time retain a portion of its earnings in order to liquidate its outstanding obligations and those of its wholly-owned subsidiary, Southwest Land Company.

These consolidated cases present a single question of law, namely, whether the taxable stock dividends are to be taxed to the trust or to the grantors, seven of whom are petitioners herein. The trust reported the taxable stock dividends as its income and paid the tax thereon. The petitioners reported none of the taxable stock dividends in their income tax returns. The respondent determined that the dividends should be taxed proportionately to the trustors. His determination accounts for a portion of the deficiency of each petitioner in each taxable year.

A general statement of the opposing positions will be helpful in understanding the points hereinafter discussed. Respondent's brief states that

\* \* \* for practical purposes it must be recognized that these eight individuals, all members of a family, constitute a single group whose interests are similar, and it is highly artificial and unrealistic to pretend that the members of this group have three different interests or motives when acting in their various capacities as trustors, trustees, and beneficiaries. These eight individuals, seven of whom are petitioners herein, have retained, in one capacity or another, either as individuals or as a group, all of the important attributes of outright ownership of the property.

Petitioners' position may be briefly summarized as follows: Chandler Trust No. 2 was created for reasons diametrically opposed to the purposes which

prompt the establishment of the Clifford-type trust. The eight trustors were adult members of the Chandler family. They owned certain capital stock outright with all the attributes of ownership. When they individually transferred this property to the trust, they relinquished many of these attributes of ownership. Thereafter, they were no longer outright owners of the stock but life tenants with powers to appoint the remainders. Thereafter, each was committed to support Norman Chandler for active management of The Los Angeles Times during his lifetime unless all agreed otherwise, including Norman Chandler. The purpose of the trust was to surrender and relinquish the unlimited rights of ownership previously enjoyed by each individual petitioner and trustor.

The first disputed point is whether a valid trust was created. Petitioners contend that a valid trust was created under the laws of California. They cite various California cases in support of their contention, most of which are considered in *Bixby vs. California Trust Co.* (1948), 190 P. (2d) 321. Respondent also cites and relies upon the latter case in support of his contention that the trust can be revoked by the unanimous action of the eight trustors. Respondent's theory, as we understand him, is that since the trustors by acting in unison may terminate the trust and take down the taxable stock dividends, the dividends are taxable proportionately to them.

Petitioners contend that no one of the trustors, nor all of them together, could terminate the trust

for the simple reason that it would be impossible to obtain the consent of all parties in interest under the law of California. The respondent says that "all parties in interest," whose consent must be obtained under California law to terminate the instant trust, means only the eight individual trustors, trustees, and "present beneficiaries." Our question then is to decide whether California law recognizes that there are parties in interest other than the eight individuals aforementioned.

In the Bixby case, *supra*, the trustor created a trust the income of which was payable to himself for life and upon his death the trustee, California Trust Company, was to distribute the trust corpus to his heirs-at-law in accordance with the laws of succession then in effect in California. Bixby sued in equity to terminate the trust, claiming he was the sole beneficiary, and as such was entitled in equity to a decree of termination. It was stipulated that Bixby had a wife, a father, a mother, and sisters living. The California court, after a careful consideration of the decided cases in California and elsewhere, held that Bixby was not the sole beneficiary of the trust; that he reserved a life estate in himself with contingent remainders to his heirs, who took by purchase and not by descent; that until the death of the creator no person could answer the description of heir; and that the trust could not be terminated without the consent of such beneficiaries.

In the Bixby case no power of appointment was retained by the creator or trustor. But in *Gray vs.*

Union Trust Co., 171 Cal. 637, 154 P. 306, the trustor transferred the property in trust for her lifetime and reserved a power of appointment exercisable by will. The trust agreement provided that in default of appointment the trust corpus should go to her heirs-at-law according to the laws of succession then existing. The trustor was entitled to the net income. The trust was to terminate at the trustor's death. The trustor sought the aid of equity to terminate the trust. The California court refused to terminate the trust holding, *inter alia*, that the trust created vested remainders in trustor's heirs subject to divestiture only upon her exercise of the power of appointment by will. The court pointed out that the trustee owed precisely the same duty to protect the rights of the indeterminable class of beneficiaries as to protect the rights of the named beneficiary, the trustor.

These consolidated cases present in each instance a situation where one trustor transferred property in trust to eight trustees, the income from his proportionate part of the corpus to be paid to him for his lifetime. After his death the income was to go to his spouse for life, then to their issue, if any, and then to the living heirs of the trustor during their respective lives until the trust terminated. The trustor gave his share of the trust corpus upon termination of the trust to his then living issue in equal shares, *per stirpes*, and if none survived, then to his living heirs at law in accordance with the laws of

succession of California in force at the time of the trustor's death.

We are convinced by the cited and other authorities that petitioners created with the trust vested remainders in their heirs; that no person answering the description of "heir" can be determined until the death of the trustor; that under such circumstances it is impossible to secure the consent of all parties in interest to a termination of the trust; and that in the absence of such consent a court of equity would refuse to terminate the trust.

The power of appointment reserved by each trustor does not, in and of itself, prevent the vesting of the remainders created by the trustor. Section 781 of the California Civil Code provides specifically that a "general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not exercised." See also Gray and Bixby cases, *supra*. Any exercise of the power of appointment by writing filed with the trustees can be revoked by a subsequent writing, and it cannot be said until a trustor's death whether trust income and corpus will go according to the trust indenture or according to his duly exercised power of appointment. But until such time as the remaindermen are divested of their interests, as provided in the trust indenture, they are beneficiaries of the trust who are entitled to take after the calling in of the life estate.

Respondent further contends that the trust is not valid for the reason that the trustors can, by the exercise of the right of amendment or modification, re-



served in Article IX, bring about the termination of the trust. The right, as reserved, is set forth in our findings. Reference thereto discloses that this right and the exercise thereof is extremely limited. In the first place the right existed only during the joint lives of the trustors. In the second place the trustors could exercise the right only by unanimous agreement among themselves. In the third place the right could be exercised only with respect to specified Articles in the trust instrument, one of which, Article III, is involved in respondent's present contention. A fourth limitation provided that no modification should be effective which directly or indirectly changed the duration of the trust, or the initial character of the trust estate as provided in Articles I, IV and VIII. And finally, the provisions of the last-mentioned three Articles were in all respects, and in each and every provision thereof, irrevocable.

The limitations placed upon the individual trustor's right to amend or modify certain Articles of the trust agreement are sufficient, in our opinion, to prohibit action in concert by the eight trustors to accomplish indirectly that which they could not accomplish directly. Any modification or amendment that would indirectly permit them to terminate the trust is banned by the trust indenture. The California authorities show that any contingent remainderman under the present trust could ask, and would receive, the aid of a court of equity to protect his beneficial interest if the trustors sought to extinguish his rights by terminating the trust.

When the trust provisions are read in the light



of the above rules we are convinced that the trustors could not have terminated the trust by amendment or modification of its provisions so as to exclude all beneficiaries except themselves. We are further convinced that the trustors manifested an intention to, and did, give beneficial interests in the trust income and corpus to persons other than themselves, and that some of such beneficiaries therein designated were indeterminable and could not, therefore, have consented to the termination of the trust. Since all the parties in interest could not have consented to the termination of the present trust, the rule contended for by respondent is inapplicable.

Respondent does not contend that either the trustors or the trustees had any power or discretion to make any distribution of the stock dividends to the present beneficiaries.

Respondent also contends that the trust is invalid for the reason that petitioners' interests in the trust are subject to the claims of creditors. He contends that the spendthrift trust provisions contained in Article VIII are, under the present circumstances, contrary to public policy and are invalid under California law, citing *McColgan v. Magee*, 172 Cal. 182, 155 P. 995, and Section 175, 25 Cal. Jur. 325. The rule in California, as in many other jurisdictions, is that where an individual conveys property to trustees and provides that the income shall be paid to himself, free of the claims of creditors, the attempt to evade his creditors' demands is ineffectual, and the property is subject to execution against him to

the same extent as property of which he has retained the legal title. *McColgan v. Magee*, *supra*. The rule does not depend upon any fraudulent intent of the trustor, but applies irrespective of his intent. *Bixby v. California Trust Co.*, *supra*; *McColgan v. Magee*, *supra*.

Apparently respondent's theory, although not so stated, is that since the trust is invalid as to petitioners' creditors, it is invalid for all purposes. The *McColgan* case, upon which he relies, does not so hold. *Bixby v. California Trust Co.*, *supra*. The latter case specifically holds to the contrary. Here, as in the *Bixby* case, there is no evidence that the trust was created for the purpose of defrauding creditors. Had the trust been created for that purpose the petitioners could not take advantage of their "own wrong in a court of equity to compel termination or extinguishment of the trust on that ground," 190 Pac. (2d) 321, 329. Here, as in the latter case, the declaration of trust created contingent remainders. Equity treats the trust as void only in so far as it operates to defeat the claims of petitioners' creditors. "In all other respects it is valid and its purposes have not been accomplished." *Idem*, p. 329. Since the petitioners cannot revoke the trust and since the rights of creditors invalidate the trust only with respect to the creditors' claims, without otherwise affecting its validity, we hold that for tax purposes a valid trust was created.

The second, third and fourth points in dispute are whether petitioners should be taxed on the stock dividends under, respectively, section 22 (a), section

166 or section 167, Revenue Act of 1938 and the Internal Revenue Code. Petitioners rely upon *Lady Marian Bateman*, 43 B.T.A. 69, as affirmed by the Circuit Court of Appeals for the First Circuit, 127 Fed. (2d) 266. Respondent relies upon *Stanley J. Klein*, 4 T.C. 1195, affirmed per curiam (CCA-3), 154 Fed. (2d) 58, certiorari denied, 328 U. S. 869. He distinguishes the *Bateman* case and contends that the trustors, individually or as a group, retained such important attributes of outright ownership of the property that they were the owners of the stock dividends in any event.

In the *Bateman* case the settlor created a trust which reserved to her a life interest in a portion of the trust income, a power to appoint the corpus effective upon her death, and provided that each year five per cent of the net income of the trust should be added to corpus. In the taxable years 1935 and 1936 the settlor received 95 per cent of the trust income. Respondent determined that she was taxable upon the entire net income of the trust under sections 22 (a), 166 or 167 of the applicable revenue acts. The settlor appealed and we held that she was not taxable upon the five per cent accumulated annually as a part of the trust corpus under any of the cited statutory sections, and the First Circuit affirmed.

We can not agree with the distinctions suggested by the respondent. The trust herein had as its principal purpose the family control of The Times stock so that Norman Chandler would be assured the presidency and general managership of The Los An-

geles Times. This was a business, and not a tax-avoidance, purpose. The receipt by the trustor-beneficiaries of substantially the same cash income from the trust as they would have received had the property not been conveyed in trust also refutes the respondent's suggestion that the trust was created for tax-avoidance purposes. Nor are we impressed with the suggested distinction that each trustor did not convey to independent trustees. It is true that each trustor was a member of the Chandler family, but it is also true that each was an adult member of that family. The trust was not dominated by one or both parents, as is frequently true in trusts created for tax-avoidance purposes. We are convinced that the other seven trustees were independent of the trustor-trustee who conveyed the property.

In determining whether the trustors are taxable under section 22 (a) a variety of factors and circumstances must be considered, no one of which is normally decisive, but all of which are relevant to the question of ownership. *Helferich v. Clifford*, 309 U. S. 331. It is established that each of the petitioners, prior to the conveyance in trust, owned the entire bundle of rights inherent in the ownership of the property transferred. We must decide whether, after the conveyance in trust, each trustor still retained, for all practical purposes, the ownership of that property.

After the conveyance no trustor could vote, pledge, alienate, or otherwise deal with his former Chandis stock. He could not receive cash or stock

dividends thereon. He could not exercise individually any of the rights of ownership with respect to that stock which he enjoyed prior to the conveyance. He could not sell, invest and reinvest the proceeds of any sale. He could not anticipate, assign or alienate his present right to receive trust income. His sole power over trust income was to appoint the beneficiary or beneficiaries entitled thereto after his death. He had no right to "sprinkle" trust income during his lifetime, as the trustor was entitled to do in *Commissioner v. Buck*, 120 Fed. (2d) 775. He had no right, individually or as trustee, to withhold income in his discretion, to accumulate income for the remainderman as against the life tenant, to treat corpus as if he were the owner thereof, to hold trust assets without disclosing the trust, to remove trust assets to some other jurisdiction, or to exercise any unusual or extraordinary powers, as the trustor-trustee was entitled to do in *Louis Stockstrom*, 3 T. C. 255, affirmed 148 Fed. (2d) 491. Here, a trustor had no power of management or control over corpus or income whatever, as such power was vested in eight trustees who could exercise their power in many instances only by their unanimous agreement, and in any event only by a majority vote of such trustees. No trustor could, at his pleasure, control the acts of, or remove, any trustee. No trustor could amend, alter, revoke or modify any provision of the trust indenture. Certain provisions of the indenture could be modified by the unanimous action of the trustors during their joint lives, but



no modification could be effective which directly or indirectly changed the duration of the trust or the initial character of the trust estate.

Respondent contends, however, that any attribute of ownership conveyed away by the individual trustees was vested in the family group, either as trustees or trustors, so that actually control and domination of the property and income continued unchanged. The powers granted the trustees do not support this contention. Paragraphs one to four of Article VI deal with the trust corpus while it consists of The Times and Chandis stock, and, generally speaking, requires the unanimous agreement of the eight trustees to act with respect thereto. Paragraph four provides for the management of the trust in the event that assets of a substantially different character are held by the trustees, a contingency which did not occur during any of the taxable years, so that the powers and discretions therein granted are inapplicable to the present issue. Paragraph six grants certain general powers and discretions to the trustees except that the trustees shall have no power or discretion to determine the nature of "all stock dividends," or "all cash dividends." The first, in the words of the indenture, "shall inure to or fall upon principal", and the other, "shall go to income of the Trust Estate." The powers and discretions vested in the trustees are fiduciary powers which must be exercised in good faith for the benefit of the beneficiaries and not for the personal benefit or aggrandizement of the trustors. Anthony

J. Drexel Biddle, Jr., et al., 11 T. C. (promulgated November 30, 1948).

Respondent also contends that the trustors, as a family group, retained dominion and control over corpus and income by reserving to themselves the power to modify the trust instrument. He reasons that by modification of the proper paragraphs of the instrument the trustors could take possession of the stock dividends. A brief examination of some of the trust provisions that would have to be modified under the reserved power will suffice to show that no such dominion and control was retained by the trustors.

In the first place, Article I requires that throughout the term of the trust the trust corpus shall consist of "all of the shares of the capital stock of Chandis Securities Company delivered to the Trustees hereunder." The stock dividends in question were preferred shares of Chandis and, by the provisions of Article VI, inured to and fell into principal. Such dividends became a part of, and remained a part of, corpus during the term of the trust. The provisions of Article VI (2) show that the powers conferred upon the trustees by the trustors were to "be exercised only to maintain such a proportionate interest as is now represented in" The Times and Chandis companies. Reference to Exhibit 2-B attached to the stipulated facts shows that the preferred stock carried voting rights of one and three-sevenths votes for each share of preferred, as compared to one vote for each share of common. Any



amendment by the trustors as a group that distributed the preferred stock would, therefore, destroy the proportionate interest that the trust had in Chandis. Such an amendment would change the initial character of the trust and would exceed the limited power of modification reserved by the trustors.

Another reason which makes any joint action by the trustors on the above amendment unlikely is the adverse interest of Norman Chandler. His personal interests would undoubtedly lead him to object to any modification that would hurt his chances to assume the presidency of The Times. Without his consent the other trustors would be powerless to modify the trust instrument in any particular.

A third deterring factor in making any such amendment is the rights of the remaindermen. As hereinabove pointed out, California law would not permit the trustors to terminate the trust upon the theory that they were the only interested parties. If the trustors could amend so as to distribute a part of the trust corpus, they could amend so as to distribute the entire corpus and thus terminate the trust. The law will not permit the trustors to accomplish by indirection that which they can not do directly. We are of the opinion that any remainderman could, by proper court action, prevent the trustors from distributing the corpus to the life tenants. Bixby case, *supra*.

What has been said with reference to Article I and the modification thereof applies with equal force

to the amendment of Article III. This Article provides for the distribution of the entire net income of the trust available in cash to the present beneficiaries. If the trustors amended this Article to require the distribution of all stock dividends, in addition to all cash dividends, then the situation would be identical with that above related. With each distribution of stock dividends the trust's proportionate interest in Chandis would decrease. In view of the declared purpose of the trust it can not be assumed that Norman Chandler would ever consent to any change or modification that was directly contrary to his interests. But if he consented, and if the trustors unanimously agreed to amend, the amendment would still violate the express terms of the trust and would exceed the limited power of modification reserved in Article IX.

Our findings show that during each of the taxable years trust corpus was increased by taxable stock dividends. It follows that the pro rata share of each trustor under the power of appointment retained in Article III was increased. This power could be exercised during the trustor's lifetime but was effective only at death. It could not be exercised to reduce corpus or income to the trustor's possession. It is suggested, however, that the power to appoint after death permitted the trustor to realize substantial economic benefits which can be taxed to the trustor under the broad sweep of section 22 (a). A similar contention was made and rejected in the Bateman case after the Circuit Court reviewed a number of

Supreme Court cases, including the Clifford case and *Helvering v. Horst*, 311 U. S. 112. We hold, therefore, that the trustors received no such substantial economic benefits under their reserved power of appointment as would justify our taxing the stock dividends to them as realized income.

The Klein case, *supra*, upon which respondent relies, is distinguishable factually and legally from these cases. Our opinion therein distinguishes that case from the Bateman case and points out (p. 1201) that it is more analogous to the Buck case, *supra*. These cases are unlike the Buck and Klein cases.

In view of the foregoing we hold that the stock dividends are not taxable to the trustors under Section 22 (a).

Respondent's alternative contentions, that sections 166 or 167 apply, are not well founded. As we have hereinbefore pointed out, this is not a revocable trust. Nor is there any basis for holding that the trustors could, by joint action, work a forfeiture, when they could not, by direct action, terminate the trust and take over the corpus. It is equally clear, in our opinion, that the taxable stock dividends were not held, used or accumulated for the benefit of the grantors. Such dividends became a part of trust corpus which would be distributed to those entitled to take at the expiration of the trust. We hold that sections 166 and 167 are inapplicable. *Commissioner v. Bateman*, *supra*.

The final dispute between the parties is whether the policy announced in T. D. 5488, C. B. 1946-1, 19,

and T. D. 5567, C. B. 1847-2, 9, amending section 29.22 (a)-21, Regulations 111, should be applied in this instance the amendments, which apply only to taxable years beginning with, or after January 1, 1946, were approved December 29, 1945, and June 30, 1947, respectively, and dealt with the taxation of trust income to the grantor within the principles of *Helvering v. Clifford*, *supra*.<sup>1</sup> In connection with the graphs one to four of Article VI deal with the trust amendments, the respondent, by Mim. 5968, C.B. 1946-1, 25, and Mim. 6156, C.B. 1947-2,13, stated that "it will be the policy of the Bureau, where no inconsistent claims prejudicial to the Government are asserted by trustees or beneficiaries, not to assert liability of the grantor for any prior taxable year under the general provisions of section 22 (a) of the Internal Revenue Code if the trust income would not be taxable to the grantor under the regulations as amended." Mim. 6156.

Petitioners contend that they are entitled to benefit from the foregoing statement of Bureau policy even though the amendments are not retroactive. This contention is obviously in the alternative, although not so stated. In other words, if petitioners lost on the other contentions they rely upon Bureau policy as above set forth. It is unnecessary to explore the arguments of the parties on this point in view of our conclusions on the other contentions.

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<sup>1</sup>The amendments need not be set forth in view of our disposition of this point.

For the reasons and upon the authorities above-mentioned we hold that petitioners created a valid trust; that they are not taxable under section 22 (a) as construed by the Clifford case, *supra*; that the trust is not revocable within the meaning of section 166; and that the trust income, in so far as the stock dividends are concerned, is not held or accumulated for future distribution for the benefit of the grantors within the meaning of section 167.

The parties have stipulated the deficiencies and overpayments in income taxes for the taxable years to be as follows in the event that we determine the stock dividends are not taxable to petitioners. (The amounts shown in parentheses represent overpayments):

Taxpayers	1938	1939	1940	1941
May C. Goodan .....	\$ 317.48	\$20,482.24	(\$50.91)	\$ 240.32
Marian O. Chandler .....	21,301.69	42.61	184.38	626.45
Norman Chandler .....	4,592.52	918.09	1,218.56	1,840.23
Philip Chandler .....	(13.79)	407.21	300.00	1,209.86
Constance C. Crowe .....	1,577.88	938.28	1,286.73	700.51
Helen C. Garland .....	133.03	59.22	582.38	16.20
Ruth C. Williamson .....	96.65	1,583.92	(48.66)	234.79

It is further stipulated and agreed, and the Court may find as part of its decisions, that the deficiencies in amounts above stated were paid by the respective petitioners to the collector of internal revenue at Los Angeles, California, on December 31, 1946, with the following exceptions: in the case of May Chandler Goodan part payment of the deficiencies for the years 1938 and 1939 were made on June 30, 1944, in the amounts of \$236.42 and \$20,-

294.44, respectively, and the deficiency for 1941 has not been paid; in the case of Philip Chandler the deficiencies for the years 1939 to 1941 in the total amount of \$1,917.07 have been reduced by the overpayment for the year 1938 of \$13.79 and the net amount of \$1,903.28 was paid on December 31, 1946; and in the case of Ruth Chandler Williamson deficiencies for the years 1938, 1939 and 1941, less an overpayment for the year 1940, were paid on December 31, 1946, as follows:

1938 .....	\$ 96.65
1939 .....	5,290.50
1941 .....	234.79
	<hr/>
	\$5,621.94
1940 .....	48.66
	<hr/>
Net Amount Paid .....	\$5,573.28

It is further stipulated and agreed, and the Court may find as part of its decisions, that the overpayments above stated were made within three years before the mailing of the notices of deficiency or the filing of the petitions or the execution of consents under the provisions of section 276 (b) of the Internal Revenue Code or the Revenue Act of 1938, and that the notices of deficiency were mailed, the petitions were filed, or the consents were executed within three years from the time the returns were filed. (Section 322 (d) of the Internal Revenue Code and the Revenue Act of 1938, as amended by section 169 (b) of the Revenue Act of 1942 and section 509 of the Revenue Act of 1943.)



Reviewed by the Court.

Decisions will be entered accordingly.

Seal.

Kern, J., dissenting:

I am of the opinion that the powers retained by the trustors by Article IX of the Trust Indenture and specifically embracing the power to modify the provisions of Article VI, make this case more analogous to *Stanley J. Klein*, 4 T.C. 1195, *affd.* 154 Fed. (2d) 58, than to *Lady Marian Bateman*, 43 B.T.A. 69, *affd.* 127 Fed. (2d) 266; and therefore I respectfully dissent from the conclusion of the majority. *Turner, Murdock, and Disney, J.*, agree with this dissent.

Served May 23, 1949.

Seal



[Title of Tax Court and Causes.]

Docket Nos. 3033, 3036, 3037, 3038, 3039, 3040.  
and 3041.

### MOTION TO VACATE DECISION

Comes now the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and moves that the Tax Court's decision entered May 24, 1949, be vacated and set aside, and for cause therefor states:

The respondent has this date filed a motion for reconsideration for the following reasons:

1. *Bixby v. California Trust Company* (1949) 190P. (2d) 321, which furnished the chief basis for the petitioner's contention and the Court's Findings of Fact and Opinion herein has been reversed by the Supreme Court of California, *Bixby v. California Trust Company* (February 25, 1949) 202 P. (2d) 1018. Thus, the legal basis for the Court's Findings and Opinion no longer exists. Under the laws of California, as restated by the Supreme Court, the trust is revocable and the parties in interest could terminate it. Hence, a decision for respondent is required. *Bixby v. California Trust Company*, *supra*.

2. *Gray v. Union Trust Company*, 171 Cal. 637, 154 Pac. 306, also relied upon by the petitioners and the Tax Court was distinguished by the California Supreme Court in the *Bixby Case*, *supra*,

on the ground that the remaindermen (trustor's heirs) were to be determined by the laws of succession in effect at the time the trust was created. This distinction shows that the Gray case, *supra*, has no bearing on the instant cases. In the instant cases the purported "remainders" were to the trustor's "\* \* \* living heirs at law in accordance with the laws of succession in California in force at the time of the trustor's death" (Page 20, Tax Court's Opinion herein). It is now manifest that under California law such language does not create a remainder interest. Moreover, see Justice Carter's concurring opinion that *Gray v. Union Trust Company, supra*, is not sound law and should be overruled.

3. Plainly, in the instant cases the heirs were to take the corpus in accordance with the laws of succession of California in force at the time of the trustor's death. Thus, therefore, under California law as restated the trust instrument created no remainder interest in the heirs at law. Therefore, the trust is revocable and terminable as contended for by respondent, making the stock dividends taxable to petitioners under Sections 22(a), 166 and 176 of the Internal Revenue Code.

4. Moreover, *Nelson v. California Trust Company* (February 25, 1949) 202 P. (2d) 1021 which case involved the identical trust as in the *Bixby v. California Trust Company* case, *supra*, and decided the same day, furnishes further support for

respondent's position as to the invalidity and non-effectiveness of the subject trust under California law.

5. As additional support for this motion, respondent refers to and incorporates his brief on file herein.

Wherefore, it is prayed that this motion be granted.

/s/ CHARLES OLIPHANT,  
Chief Counsel,  
Bureau of Internal  
Revenue.

Of Counsel:

B. H. Neblett,  
Division Counsel,

R. C. Whitley,  
Special Attorney,  
Bureau of Internal Revenue.

Received and filed June 7, 1949. U. S. T. C.

[Title of Tax Court and Causes.]

Docket Nos. 3033, 3036, 3037, 3038, 3039, 3040, and 3041.

### ORDER VACATING DECISIONS

Decisions in the above-entitled causes were entered May 24, 1949. Thereafter, and on June 7, 1949, respondent filed a Motion to Vacate Decisions, and also a Motion to Reconsider and Set Aside The Tax Court's Findings of Fact and Opinion Herein. Hearing was had on said motions in Los Angeles, California, on June 13, 1949, and it appearing that our decisions should be vacated pending action on respondent's Motion to Reconsider and Set Aside The Tax Court's Findings of Fact and Opinion Herein, it is Now, Therefore,

Ordered: That the decisions entered herein on May 24, 1949, be and the same are hereby vacated.

/s/ WILLIAM W. ARNOLD,  
Judge.

Washington, D. C.

Dated: August 15, 1949.

Served Aug. 16, 1949.

[Title of Tax Court and Causes.]

Docket Nos. 3033, 3036, 3037, 3038, 3039, 3040, and 3041.

ORDER DENYING RESPONDENT'S MOTION  
TO RECONSIDER AND SET ASIDE FIND-  
INGS OF FACT AND OPINION

On June 7, 1949 respondent filed separate motions. (1) To vacate our decisions entered May 24, 1949, and (2) to reconsider and set aside our findings of fact and opinion. The motions were argued in Los Angeles and the parties granted until July 28, 1949, and August 29, 1949, for briefs and reply briefs, respectively. On August 15, 1949, we vacated our decisions, pending action upon respondent's motion to reconsider and set aside our findings of fact and opinion. Full and complete consideration having been given to the parties' briefs and reply briefs on the motion and to our findings of fact and opinion, in 12 T.C. 817, it is

Ordered: That respondent's motion to reconsider and set aside our findings of fact and opinion, be and the same is hereby denied for the reasons briefly set forth in the memorandum accompanying this order.

Dated: Washington, D. C., November 30, 1949.

[Seal]     /s/ WILLIAM W. ARNOLD,  
Judge.

\*Proceedings of the following petitioners are

consolidated herewith: Marian Otis Chandler; Norma Chandler; Philip Chandler; Constance Chandler Crowe; Helen Chandler Garland; and Ruth C. Williamson.

### MEMORANDUM ACCOMPANYING ORDER

The principal ground for respondent's motion is that *Bixby v. California Trust Company* (1948), 190 P. (2d) 321, cited and relied upon in our report, was reversed by the Supreme Court of California in *Bixby v. California Trust Company* (February 25, 1949), 202 P. (2d) 1018, which was subsequent to the time this case was submitted to us. Respondent contends that under the California law, as restated by its Supreme Court in the 1949 *Bixby* decision, the present trust created no remainder interests in the heirs-at-law and the trust is revocable and terminable.

In its 1949 *Bixby* decision the California Supreme Court clearly stated the general rule to be: "*Where the trustor is the sole beneficiary \* \* \**, he can compel termination *in the absence of a showing of incapacity or other reason why he should not be permitted to exercise control over his property \* \* \*.*" [Emphasis supplied]. And with equal clarity the California Supreme Court stated the following limitation or exception to the general rule: "*On the other hand, if remainder interests were created in plaintiff's [Bixby] heirs, they were also beneficiaries, and the court could not terminate the trust without their consent.*" [Emphasis supplied].

Whether remainder interests were created in the trustor's heirs-at-law is a matter of intent according to the California Supreme Court. And where the trustor creates a life estate in himself with a gift over to his heirs he ordinarily intends the same thing as if he had given the property to his estate; he does not intend to make a gift to any particular person but indicates only that upon his death the residue of the trust property shall be distributed according to the general laws governing succession, and he does not intend to create in any persons an interest which would prevent him from exercising control over the beneficial interest. See 202 P. (2d) 1019.

Under well recognized rules of construction of written instruments all provisions of a trust indenture must be given consideration in arriving at the intent of the parties thereto. No trustor here provided for the termination of the trust on his or her death with gift over to heirs generally as in the Bixby case. On the contrary each trustor provided that upon his or her death trust income should go to a particular person, the spouse. In the event the spouse predeceased the trustor, the trust income was given to a particular class of persons, the issue. If no spouse and no issue survived the trustor then gave the trust income to the living heirs of the trustor until the termination of the trust. Similarly the trustor provided that upon termination of the trust the trust corpus was vested in and distributed to a particular class, namely, his or her then living issue, per stirpes; and if none survived, trust corpus



was to go, upon termination of the trust, to the living heirs-at-law, the identity and respective shares to be determined by California law in force at the time of the trustor's death. It was only after the natural objects of the trustor's bounty ceased to exist that the California law of succession was to take its course.

Nor could the trustors under the power of appointment reserved to them in Art. III of the trust instrument vest at death such an interest in the corpus as heirs generally take under California law. This is so for the reason that Art. IV fixes the termination of the trust upon the death of the last survivor of 21 named individuals. Art. IV. is irrevocable. Art. IX expressly prohibits the trustors from doing anything, directly or indirectly, that would terminate the trust prior to the expiration of the fixed term thereof, to vest the unrestricted ownership, use, possession and control of trust corpus in themselves or in their appointees, at or prior to the expiration of the fixed term of the trust. Should an attempt be made under the power of appointment to appoint corpus to heirs generally at death, the possession and control thereof would be held in abeyance until the death of the last survivor of the 21 named individuals. Corpus could not pass at death to the heirs.

Under well recognized rules of construction of written instruments all provisions of a trust indenture must be given consideration in arriving at the intent of the parties thereto. No trustor here pro-

vided for the termination of the trust on his or her death with gift over to heirs generally as in the Bixby case. On the contrary each trustor provided that upon his or her death trust income should go to a particular person, the spouse. In the event the spouse predeceased the trustor, the trust income was given to a particular class of persons, the issue. If no spouse and no issue survived the trustor then gave the trust income to the living heirs of the trustor until the termination of the trust. Similarly the trustor provided that upon termination of the trust the trust corpus was vested in and distributable to a particular class, namely, his or her then living issue, *per stirpes*; and if none survived, trust corpus was to go, upon termination of the trust, to the living heirs-at-law, the identity and respective shares to be determined by California law in force at the time of the trustor's death. It was only after the natural objects of the trustor's bounty ceased to exist that the California law of succession was to take its course.

Nor could the trustors under the power of appointment reserved to them in Art. III of the trust instrument vest at death such an interest in the corpus as heirs generally take under California law. This is so for the reason that Art. IV fixes the termination of the trust upon the death of the last survivor of 21 named individuals. Art. IV is irrevocable. Art. IX expressly prohibits the trustors from doing anything, directly or indirectly, that would terminate the trust prior to the expiration of the fixed term thereof, to vest the unrestricted

ownership, use, possession and control of trust corpus in themselves or in their appointees, at or prior to the expiration of the fixed term of the trust. Should an attempt be made under the power of appointment to appoint corpus to heirs generally at death, the possession and control thereof would be held in abeyance until the death of the last survivor of the 21 named individuals. Corpus could not pass at death to the heirs-at-law generally as the Supreme Court of California in the Bixby case said would be necessary to give trustors such rights of control as would make them in effect owners of the corpus. As the trustors could not vest the unrestricted use, possession and control of the corpus in their heirs-at-law at death, their appointees, whether heirs-at-law or others, would be in no better position under California law. In other words, the appointees take their interests subject to the terms of the trust agreement.

For the foregoing reasons the decisions vacated August 15, 1949 will be reentered.

Entered Nov. 30, 1949.

Served Dec. 1, 1949.

The Tax Court of the United States  
Washington

Docket No. 3033

MAY CHANDLER GOODAN,

Petitioner,

Vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION

Pursuant to the Opinion of this Court, promulgated May 23, 1949, it is

Ordered and decided: That there are deficiencies in income tax for the calendar years 1938, 1939 and 1941 in the respective amounts of \$317.48, \$20,482.24, and \$240.32; and that there is an overpayment in income tax for the calendar year 1940 in the amount of \$50.91, which overpayment was made within three years before the filing of the petition.

[Seal]            /s/ WILLIAM W. ARNOLD,  
Judge.

Entered Nov. 30, 1949.

Served Dec. 1, 1949.

In The United States Court of Appeals  
For the Ninth Circuit

T. C. Docket No. 3033

COMMISSIONER OF INTERNAL REVENUE,  
Petitioner on Review,

vs.

MAY CHANDLER GOODAN,  
Respondent on Review.

### PETITION FOR REVIEW

To the Honorable Judges of the United States Court  
of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on November 30, 1949 "That there are deficiencies in income tax for the calendar years 1938, 1939 and 1941 in the respective amounts of \$317.48, \$20,482.24, and \$240.32; and that there is an overpayment in income tax for the calendar year 1940 in the amount of \$50.91" in respect of the Federal income tax liability of May Chandler Goodan, the above-named respondent on review. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The respondent on review, May Chandler Goodan, is a resident of Los Angeles, California, and filed her Federal income tax returns for the years 1938, 1939, 1940 and 1941 with the Collector of Internal Revenue for the Sixth District of California, whose

office is in Los Angeles, California, and within the jurisdiction of the United States Court of Appeals for the Ninth Circuit wherein this review is sought.

### Nature of Controversy

The issue presented to and passed upon by The Tax Court of the United States and which was decided contrary to the Commissioner's determination is whether certain taxable stock dividends which were received by Chandler Trust No. 2, of which trust the respondent on review was one of the life tenant trustors are taxable to the life tenant trustors of the trust, as determined by the Commissioner, or, as claimed by the taxpayer, to the trust itself. The Tax Court held, contrary to the Commissioner's determination, that Sections 22(a), 166, and 167 of the Revenue Act of 1938 and the Internal Revenue Code are inapplicable and that the stock dividends in question are taxable to the trust rather than to the life tenant beneficiaries and trustors. The Commissioner's determination in this and related cases was thus disapproved in so far as it reflected the Commissioner's inclusion of an allocate portion of the taxable stock dividends in the taxable income of each of the life tenant trustors for the years here involved.

/s/ THERON L. CAUDLE,  
Assistant Attorney General.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue, Attorneys for the Petitioner on Review.

[Endorsed]: Filed Feb. 17, 1950 U. S. C. A.

[Title of Court of Appeals and Cause.]

Docket No. 3033

### STATEMENT OF POINTS

Comes now the Commissioner of Internal Revenue, petitioner on review in the above-entitled cause, by and through his attorneys, Theron L. Caudle, Assistant Attorney General, and Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and hereby states that he intends to rely upon the following points in this proceeding:

The Tax Court of the United States erred:

1. In ordering the deciding that there are deficiencies in income tax for the years 1938, 1939 and 1941 in the respective amounts of only \$317.48, \$20,482.24 and \$240.32; and that there is an overpayment in income tax for the calendar year 1940 in the amount of \$50.91.

2. In failing and refusing to sustain the deficiencies in tax determined by the Commissioner, as modified by the stipulation of the parties, on the basis that the stock dividends received by the Chandler Trust No. 2 were taxable to the life tenant trustors.

3. In holding that the Chandler Trust No. 2 was, for Federal income tax purposes, a valid trust under the laws of California.

4. In failing and refusing to hold and decide that the Chandler Trust No. 2 was, by virtue of the rights



of amendment or modification reserved by the trustors, not a valid trust for Federal income tax purposes and that, accordingly, the taxable stock dividends received by the trust during the taxable years were taxable to the life tenant trustors under Sections 22(a) and/or Sections 166 and 167 of the Revenue Act of 1938 and the Internal Revenue Code, rather than to the trust itself.

5. In holding that Sections 22(a), 166, and 167 of the Revenue Act of 1938 and the Internal Revenue Code are inapplicable.

6. In denying the Commissioner's motion to reconsider and set aside the Court's findings of fact and opinion.

7. In that its opinion and decision are contrary to the facts as stipulated by the parties.

8. In that its opinion and its decision are contrary to law and the Commissioner's regulations.

/s/ THERON L. CAUDLE,  
Assistant Attorney General.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

Statement of service attached.

Received and filed May 4, 1950 U. S. C. A.

The Tax Court of the United States

Docket No. 3036

MARIAN OTIS CHANDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:PB) dated June 30, 1943, and as a basis of this proceeding alleges as follows:

## I

Petitioner is an individual residing at 2330 Hillhurst Avenue, Los Angeles, California. Returns for the period here involved were filed with the Collector for the Sixth District of California.

## II

The notice of deficiency, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof, was mailed to the petitioner on June 30, 1943.

## III

The taxes in controversy are income taxes for the

calendar years 1938 to 1941, inclusive, totaling \$96,735.36.

#### IV

The determination of the taxes set forth in said notice of deficiency is based upon the following errors:

(1) Respondent erred in determining deficiencies in income tax for the years 1938 to 1941, inclusive, in the total sum of \$96,735.36.

(2) Respondent erred in adding to petitioner's net taxable income for the year 1938 the sum of \$20,184.88.

(3) Respondent erred in disallowing a loss of \$1333.33 sustained during the year 1938 on account of her interest in Imperial Valley Farm Lands Association becoming worthless.

(4) Respondent erred in adding to petitioner's net taxable income for the year 1938 the sum of \$93,735.18.

(5) Respondent erred in adding to petitioner's net taxable income for the year 1939 the sum of \$22,495.72.

(6) Respondent erred in increasing petitioner's net taxable income for the year by the sum of \$24,563.86.

(7) Respondent erred in increasing petitioner's net taxable income for the year 1941 by the sum of \$12,342.48.

## V

The facts upon which petitioner relies as the basis of this proceeding are as follows:

(1) Petitioner is a resident of the County of Los Angeles, State of California, and as such filed her income tax returns for each of the years herein involved with the Collector of Internal Revenue for the Sixth Collection District of California.

(2) Petitioner during the years herein involved was a beneficiary under that certain trust designated Trust No. 2, wherein Marian Otis Chandler, May C. Goodan, Constance Chandler (Constance Chandler Crowe), Ruth C. Williamson, Norman Chandler, Harrison G. O. Chandler, Helen C. Garland, and Philip Chandler are designated "present trustees."

(3) Petitioner, as beneficiary, during the year 1938 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$26,442.77, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1938 was the sum of \$46,627.65, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$20,184.88. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(4) Petitioner during the year 1938 abandoned

her interest in the Imperial Valley Farm Lands Association, which had cost her the sum of \$1333.33. Notwithstanding this fact, the respondent erroneously and illegally disallowed such loss.

(5) Petitioner during the year 1938 did not receive, either actually or constructively, the sum of \$93,735.18, which the respondent erroneously and illegally added to petitioner's net taxable income.

(6) Petitioner, as beneficiary, during the year 1939 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$25,338.77, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1939 was the sum of \$47,834.49, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$22,495.72. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(7) Petitioner, as beneficiary, during the year 1940 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$27,079.86, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1940 was the sum of \$51,-

643.72, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$24,563.86. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(8) Petitioner, as beneficiary, during the year 1941 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$34,085.00, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1941 was the sum of \$46,427.48, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$12,342.48. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(9) Respondent, under date of June 30, 1943, issued a notice of deficiency determining that said Trust No. 2 was an association taxable as a corporation. Under date of June 30, 1943, respondent issued a notice of deficiency determining that Trust No. 1, wherein Harry Chandler, Norman Chandler, and Marian Otis Chandler are designated "present trustees," and petitioner and others are designated "beneficiaries," was an association taxable as a corporation. Petitioner is informed and believes

and therefore alleges that the trustees of each of the aforementioned trusts have filed or will file a petition to The United States Tax Court for a redetermination of the deficiencies set forth in said notices; and that the actions of the respondent in determining said trusts to be associations taxable as corporations and in determining the deficiencies herein involved are inconsistent, erroneous, and illegal.

Wherefore, petitioner prays that The Tax Court of the United States hear this petition and redetermine the aforesaid deficiencies in accordance with the rights of the petitioner in the premises and grant any and all refunds that may be due as a result of such redetermination.

Dated September 20, 1943.

/s/ A. CALDER MACKAY,

/s/ ARTHUR McGREGOR,

/s/ HOWARD W. REYNOLDS,

Counsel for Petitioner.

State of California

County of Los Angeles—ss.

Marian Otis Chandler, being duly sworn, deposes and says that she is the petitioner above named; that she has read the foregoing petition, or had the same read to her, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be



upon information and belief, and that those she believes to be true.

/s/ MARIAN OTIS CHANDLER.

Subscribed and sworn to before me this 23rd day of September, 1943.

[Seal] /s/ MARY E. WHITTHORNE,  
Notary Public in and for said County and State.

My commission expires November 26, 1945.

### EXHIBIT A

Form 1279

Treasury Department  
Internal Revenue Service

417 South Hill Street  
Los Angeles, 13, California

June 30, 1943

Office of  
Internal Revenue Agent in Charge  
Los Angeles Division

LA:IT:90D:PB

Mrs. Marian Otis Chandler,  
2330 Hillhurst Avenue,  
Los Angeles, California.

Madam:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1938 to 1941, inclusive, discloses a defi-

ciency of \$96,735.36, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By GEORGE D. MARTIN,

Internal Revenue Agent in  
Charge.

Enclosures:

Statement

Form of waiver.

## Statement

LA:IT:90D:PB

Mrs. Marian Otis Chandler,  
2330 Hillhurst Avenue,  
Los Angeles, California.

Tax Liability for the Taxable Years Ended  
December 31, 1938, to 1941, Inclusive

## Income Tax

Year	Liability	Assessed	Deficiency
1938.....	\$ 73,276.99	\$ 7,406.98	\$65,870.01
1939.....	18,017.39	9,021.77	8,995.62
1940.....	31,639.94	17,525.94	14,114.00
1941.....	17,143.88	9,388.15	7,755.73
Total .....	\$140,078.20	\$43,342.84	\$96,735.36

This determination of your income tax liability has been made upon the basis of information on file in this office.

## Adjustments to Net Income

Taxable Year Ended December 31, 1938

Net income as disclosed by return.....	\$45,694.61
Additional income and unallowable deductions:	
(a) Dividends received .....	\$ 129.50
(b) Interest received .....	174.50
(c) Trust income .....	20,184.88
(d) Long-term capital losses disallowed .....	950.06
(e) Loss, Imperial Valley Farm Lands Association disallowed .....	1,333.33
(f) "Other income" .....	93,735.18
Net income adjusted .....	\$162,202.06

## Explanation of Adjustments

(a) The following amounts of dividends received are not included in the amount reported in your return:

United States Potash Company .....	\$ 45.00
Security Company .....	82.50
Fiscal Fund, Inc. ....	2.00
Total .....	\$129.50

(b) The following amounts of interest received are not included in the amount reported in your return:

Republic Natural Gas Company .....	\$ 16.00
Earl Fruit Company .....	137.50
First Industries, Inc. ....	21.00

Total .....	<u>\$174.50</u>
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(c) Income from "Chandler Trust No. 2" taxable to you has been determined in the amount of \$46,627.65, in lieu of \$26,442.77 reported in your return, an addition to income of \$20,184.88.

(d) The cost of 1035 shares of Fiscal Fund, Inc., insurance stock, acquired by purchase on March 15, 1937, and by subsequent stock dividends, sold on October 5, 1938, has been determined as \$4,023.44, in lieu of \$4,336.65 claimed in your return, resulting in a disallowance of the claimed long-term capital loss to the extent of \$208.81.

The long-term capital loss of \$741.25 claimed on account of worthlessness of stock of Rockett Lincoln Film Co., is disallowed because the stock did not become worthless during the taxable year and no loss with respect thereto was sustained during the taxable year.

These adjustments result in the disallowance of net long-term capital loss to the extent of \$950.06.

(e) The loss of \$1,333.33 claimed under item 18 of your return as "Imperial Valley Farm Lands Association. A 1/3 interest in lands out of Trust 3074. Property has been abandoned" is disallowed for lack of substantiation that a loss was sustained by you in the taxable year.

(f) Income in the amount of \$93,735.18 taxable to you under section 22(a) of the Revenue Act of 1938 arose from cancellation of your debt of \$43,670.58 to Chandis Securities Company and your debt of \$50,064.60 to Chandis Securities Company and/or "Trust A-3872."

### Computation of Alternative Tax

Taxable Year Ended December 31, 1938

Net income adjusted .....		\$162,202.06
Plus: Net long-term capital loss .....		7,787.28
Ordinary net income .....		<u>\$169,989.34</u>
Less: Personal exemption .....	\$ 2,500.00	
Credit for dependents .....	800.00	3,300.00
Balance (surtax net income) .....		<u>\$166,689.34</u>
Less: Earned income credit .....		1,400.00
Net income subject to normal tax .....		<u>\$165,289.34</u>
Normal tax at 4% on \$165,289.34 .....	\$ 6,611.57	
Surtax on \$166,689.34 .....	69,013.60	

Partial tax .....	\$ 75,625.17
Minus: 30% of net long-term capital loss .....	2,336.18
Alternative tax .....	<u>\$ 73,288.99</u>

## Computation of Tax

Taxable Year Ended December 31, 1938

Net income adjusted .....	\$162,202.06
Less: Personal exemption .....	\$ 2,500.00
Credit for dependents .....	800.00      3,300.00
Balance (surtax net income) .....	<u>\$158,902.06</u>
Less: Earned income credit .....	1,400.00
Net income subject to normal tax .....	<u>\$157,502.06</u>
Normal tax at 4% on \$157,502.06 .....	\$ 6,300.48
Surtax on \$158,902.06 .....	64,341.24
Total .....	<u>\$ 70,641.32</u>
Alternative tax .....	\$ 73,288.99
Total income tax .....	<u>\$ 73,288.99</u>
Less: Income tax paid at source .....	\$ 9.50
Income tax paid to a foreign country or U.S. possession .....	2.50      12.00
Correct income tax liability .....	<u>\$ 73,276.99</u>
Income tax assessed:	
Original, account No. 832685 .....	7,406.98
Deficiency of income tax .....	<u>\$ 65,870.01</u>

## Adjustments to Net Income

Taxable Year Ended December 31, 1939

Net income as disclosed by return .....	\$50,530.08
Additional income and unallowable deductions:	
(a) Dividends received .....	\$ 11.21
(b) Interest received .....	40.00
(c) Trust income .....	22,495.72
(d) Long-term capital loss disallowed .....	89.15      22,636.08
Net income adjusted .....	<u>\$73,166.16</u>

## Explanation of Adjustments

(a) The following amounts of dividends received are not included in the amount reported in your return:

Fiscal Fund, Inc. ....	\$ 7.21
State Street Investment Co. ....	4.00
Total .....	<u>\$11.21</u>

(b) The amount of interest received reported in your return is understated \$40.00, representing an additional amount received on Province Santa Fe-Argentine bonds.

(c) Income from "Chandler Trust No. 2" taxable to you has been determined in the amount of \$47,834.49, in lieu of \$25,338.77 reported in your return, an addition to income of \$22,495.72.

(d) The long-term capital loss from the sale of Fiscal Fund, Inc., insurance stock, claimed in the amount of \$793.80 is disallowed to the extent of \$89.15 due to the determination of long-term capital loss in the amount of \$704.65, as follows:

Sale price .....	\$7,194.61
Cost .....	8,603.91
Loss sustained .....	<u>\$1,409.30</u>
Long-term capital loss, 50% .....	\$ 704.65

## Computation of Alternative Tax

Taxable Year Ended December 31, 1939

Net income adjusted .....	\$73,166.16
Plus: Net long-term capital loss .....	<u>704.65</u>
Ordinary net income .....	\$73,870.81
Less: Personal exemption .....	<u>2,500.00</u>
Balance (surtax net income) .....	\$71,370.81
Less: Earned income credit .....	<u>1,400.00</u>
Net income subject to normal tax .....	\$69,970.81
Normal tax at 4% on \$69,970.81 .....	\$ 2,798.83
Surtax on \$71,370.81 .....	<u>15,449.45</u>
Partial tax .....	\$18,248.28
Minus: 30% of net long-term capital loss .....	<u>211.39</u>
Alternative tax .....	<u>\$18,036.89</u>

## Computation of Tax

Taxable Year Ended December 31, 1939

Net income adjusted .....	\$73,166.16	
Less: Personal exemption .....	2,500.00	
Balance (surtax net income) .....	\$70,666.16	
Less: Earned income credit .....	1,400.00	
Net income subject to normal tax .....	\$69,266.16	
Normal tax at 4% on \$69,266.16 .....	\$ 2,770.64	
Surtax on \$70,666.16 .....	15,146.45	
Total .....	\$17,917.09	
Alternative tax .....	\$18,036.89	
Total income tax .....	\$18,036.89	
Less: Income tax paid at source .....	\$ 9.50	
Income tax paid to a foreign country or U.S. possession .....	10.00	19.50
Correct income tax liability .....	\$18,017.39	
Income tax assessed:		
Original, account No. 202571 .....	9,021.77	
Deficiency of income tax .....	\$ 8,995.62	

## Adjustments to Net Income

Taxable Year Ended December 31, 1940

Net income as disclosed by return .....	\$56,627.56	
Additional income:		
(a) Dividends received .....	\$ 172.19	
(b) Interest received .....	177.00	
(c) Trust income .....	24,563.86	24,913.05
Net income adjusted .....	\$81,540.61	

## Explanation of Adjustments

(a) The following amounts of dividends received are not included in the amount reported in your return:

San Fernando Mission Land Company....	\$100.00
Fiscal Fund, Inc. ....	4.19
New England Fund .....	68.00
Total .....	\$172.19



(b) The following amounts of interest received are not included in the amount reported in your return:

Earl Fruit Company .....	\$137.50
Province Santa Fe-Argentina .....	39.50
Total .....	<u>\$177.00</u>

(c) Income from "Chandler Trust No. 2" taxable to you has been determined in the amount of \$51,643.72, in lieu of \$27,079.86 reported in your return, an addition to income of \$24,563.86.

### Computation of Alternative Tax

Taxable Year Ended December 31, 1940

Net income adjusted .....	\$81,540.61
Plus: Net long-term capital loss .....	3.46
Ordinary net income .....	<u>\$81,544.07</u>
Less: Personal exemption .....	2,000.00
Balance (surtax net income) .....	<u>\$79,544.07</u>
Less: Earned income credit .....	1,400.00
Net income subject to normal tax .....	<u>\$78,144.07</u>
Normal tax at 4% on \$78,144.07 .....	\$ 3,125.76
Surtax on \$79,544.07 .....	<u>25,652.03</u>
Partial tax .....	<u>\$28,777.79</u>
Minus: 30% of net long-term capital loss .....	1.03
Alternative tax .....	<u>\$28,776.76</u>

### Computation of Tax

Taxable Year Ended December 31, 1940

Net income adjusted .....	\$81,540.61
Less: Personal exemption .....	2,000.00
Balance (surtax net income) .....	<u>\$79,540.61</u>
Less: Earned income credit .....	1,400.00
Net income subject to normal tax .....	<u>\$78,140.61</u>
Normal tax at 4% on \$78,140.61 .....	\$ 3,125.62
Surtax on \$79,540.61 .....	<u>25,650.30</u>
Total .....	<u>\$28,775.92</u>
Alternative tax .....	<u>\$28,776.76</u>
Defense tax (10% of \$28,776.76) .....	2,877.68
Total income tax .....	<u>\$31,654.44</u>

Less: Income tax paid at source .....	\$	9.50	
Income tax paid to a foreign country or U.S. possession .....		5.00	14.50
Correct income tax liability .....			<u>\$31,639.94</u>
Income tax assessed:			
Original, account No. 856258 .....			<u>17,525.94</u>
Deficiency of income tax .....			<u>\$14,114.00</u>

## Adjustments to Net Income

Taxable Year Ended December 31, 1941

Net income as disclosed by return .....			\$24,174.47
Additional income and unallowable deductions:			
(a) Dividends received .....	\$	400.00	
(b) Interest received .....		376.50	
(c) Long-term capital losses disallowed .....		690.46	
(d) Trust income .....		12,342.48	13,809.44
Net income adjusted .....			<u>\$37,983.91</u>

## Explanation of Adjustments

(a) The following amounts of dividends received are not included in the amount reported in your return:

New England Fund .....	\$240.00
Pacific Finance Co. ....	60.00
Southern California Gas Co. ....	75.00
Gladding McBean .....	25.00

Total .....	<u>\$400.00</u>
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(b) The following amounts of interest received are not included in the amount reported in your return:

First Industries .....	\$150.00
Province Santa Fe-Argentina .....	226.50

Total .....	<u>\$376.50</u>
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(c) The basis of \$4,787.50 claimed in your return for Richfield Oil Company stock sold is disallowed to the extent of \$958.50, resulting in the disallowance of long-term capital loss from the sale to the extent of \$479.25.

The basis of \$4,872.34 claimed in your return for Fiscal Fund, Inc., insurance stock, sold is disallowed to the extent of \$422.43, resulting in the disallowance of long-term capital loss from the sale to the extent of \$211.21.

(d) Income from "Chandler Trust No. 2" taxable to you has been determined in the amount of \$46,427.48, in lieu of \$34,085.00 reported in your return, an addition to income of \$12,342.48.

Computation of Alternative Tax

Taxable Year Ended December 31, 1941

Net income adjusted .....	\$37,983.91
Plus: Net long-term capital loss .....	13,203.00
Ordinary net income .....	\$51,186.91
Less: Personal exemption .....	1,500.00
Balance (surtax net income) .....	\$49,686.91
Less: Earned income credit .....	1,400.00
Net income subject to normal tax .....	\$48,286.91
Normal tax at 4% on \$48,286.91 .....	\$ 1,931.48
Surtax on \$49,686.91 .....	19,207.80
Partial tax .....	\$21,139.28
Minus: 30% of net long-term capital loss .....	3,960.90
Alternative tax .....	\$17,178.38

Computation of Tax

Taxable Year Ended December 31, 1941

Net income adjusted .....	\$37,983.91
Less: Personal exemption .....	1,500.00
Balance (surtax net income) .....	\$36,483.91
Less: Earned income credit .....	1,400.00
Net income subject to normal tax .....	\$35,083.91
Normal tax at 4% on \$35,083.91 .....	\$ 1,403.36
Surtax on \$36,483.91 .....	12,141.96
Total .....	\$13,545.32
Alternative tax .....	\$17,178.38
Total income tax .....	\$17,178.38
Less: Income tax paid at source .....	\$ 9.50
Income tax paid to a foreign country or U.S. possession .....	25.00 34.50
Correct income tax liability .....	\$17,143.88
Income tax assessed:	
Original, account No. 930974 .....	9,388.15
Deficiency of income tax .....	\$ 7,755.73

Received and filed Sept. 27, 1943, T.C.U.S.

[Title of Tax Court and Cause.]

Docket No. 3036

### ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I and II. Admits the allegations contained in paragraphs I and II of the petition.

III. Admits that the taxes in controversy are income taxes for the calendar years 1938 to 1941, inclusive, but denies that the total proposed deficiencies aggregating \$96,735.36 are in controversy; denies the remainder of the allegations contained in paragraph III of the petition.

IV. (1) to (7), inclusive. Denies that the respondent erred as alleged in subparagraphs (1) to (7), inclusive, of paragraph IV of the petition.

V. (1) and (2). Admits the allegations contained in subparagraphs (1) and (2) of paragraph V of the petition.

(3). Admits that the petitioner in her income tax return for the year 1938 reported \$26,442.77 as income from Trust No. 2. Admits that respondent determined that the amount reportable by petitioner from said source was the sum of \$46,627.65, and accordingly increased the net taxable income reported

by petitioner by the sum of \$20,184.88. Denies that respondent's determination was erroneous and denies the remaining allegations contained in subparagraph (3) of paragraph V of the petition.

(4) and (5). Denies the allegations contained in subparagraphs (4) and (5) of paragraph V of the petition.

(6). Admits that petitioner in her income tax return for the year 1939 reported \$25,338.77 as income from Trust No. 2. Admits that respondent determined that the amount reportable by petitioner from said source was \$47,834.49, and accordingly increased net taxable income reported by petitioner by the sum of \$22,495.72. Denies that respondent's determination was erroneous and denies remaining allegations of subparagraph (6) of paragraph V of the petition.

(7). Admits that petitioner on her income tax return for 1940 reported \$27,079.86 as income from Trust No. 2. Admits that respondent determined that the sum reportable by her from said source was \$51,643.72, and accordingly increased taxable net income reported by petitioner by the sum of \$24,563.86. Denies that the respondent's determination was erroneous, and denies the remaining allegations of subparagraph (7) of paragraph V of the petition.

(8). Admits that petitioner on her return for the year 1941 reported \$34,085.00 as income from Trust

No. 2. Admits that respondent determined that the amount reportable by petitioner from said source was \$46,427.48, and accordingly increased net taxable income reported by petitioner by the sum of \$12,342.48. Denies that respondent's determination was erroneous, and denies the remaining allegations of subparagraph (8) of paragraph V of the petition.

(9). Denies the allegations contained in subparagraph (9) of paragraph V of the petition.

VI. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,  
Chief Counsel,  
Bureau of Internal Revenue

Of Counsel:

B. H. NEBLETT,  
Division Counsel.  
HAROLD D. THOMAS,  
Special Attorney,  
Bureau of Internal Revenue

Received and filed Nov. 17, 1943, T. C. U. S.

The Tax Court of the United States  
Washington

Docket No. 3036

MARIAN OTIS CHANDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION

Pursuant to the Opinion of this Court promulgated May 23, 1949, it is

Ordered and decided: That there are deficiencies in income tax for the calendar years 1938, 1939, 1940 and 1941 in the respective amounts of \$21,301.69; \$42.61; \$184.38 and \$626.45.

[Seal]     /s/ WILLIAM W. ARNOLD,  
Judge.

Entered Nov. 30, 1949.

Served Dec. 1, 1949.



In the United States Court of Appeals  
for the Ninth Circuit

T. C. Docket No. 3036

COMMISSIONER OF INTERNAL REVENUE,  
Petitioner on Review,

vs.

MARIAN OTIS CHANDLER,

Respondent on Review.

### PETITION FOR REVIEW

To the Honorable Judges of the United States Court  
of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on November 30, 1949, "That there are deficiencies in income tax for the calendar years 1938, 1939, 1940 and 1941 in the respective amounts of \$21,301.69; \$42.61; \$184.38 and \$626.45" in respect of the Federal income tax liability of Marian Otis Chandler, the above-named respondent on review. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The respondent on review, Marian Otis Chandler, is a resident of Los Angeles, California, and filed her Federal income tax returns for the years 1938, 1939, 1940 and 1941 with the Collector of Internal Revenue for the Sixth District of California, whose office is in Los Angeles, California, and within the

jurisdiction of the United States Court of Appeals for the Ninth Circuit wherein this review is sought.

### Nature of Controversy

The issue presented to and passed upon by The Tax Court of the United States and which was decided contrary to the Commissioner's determination is whether certain taxable stock dividends which were received by Chandler Trust No. 2, of which trust the respondent on review was one of the life tenant trustors, are taxable to the life tenant trustors of the trust, as determined by the Commissioner, or, as claimed by the taxpayer, to the trust itself. The Tax Court held, contrary to the Commissioner's determination, that Sections 22(a), 166, and 167 of the Revenue Act of 1938 and the Internal Revenue Code are inapplicable and that the stock dividends in question are taxable to the trust rather than to the life tenant beneficiaries and trustors. The Commissioner's determination in this and related cases was thus disapproved in so far as it reflected the Commissioner's inclusion of an allocate portion of the taxable stock dividends in the taxable income of each of the life tenant trustors for the years here involved.

/s/ THERON L. CAUDLE,

Assistant Attorney General.

/s/ CHARLES OLIPHANT,

Chief Counsel,

Bureau of Internal Revenue.

Received and filed Nov. 17, 1943. U.S.C.A.

[Title Court of Appeals and Cause.]

### STATEMENT OF POINTS

Comes Now the Commissioner of Internal Revenue, petitioner on review in the above-entitled cause, by and through his attorneys, Theron L. Caudle, Assistant Attorney General and Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and hereby states that he intends to rely upon the following points in this proceeding:

The Tax Court of the United States erred:

1. In ordering and deciding that there are deficiencies in income tax for the calendar years 1938, 1939, 1940 and 1941, in the respective amounts of \$21,301.69, \$42.61, \$184.38 and \$626.45.

2. In failing and refusing to sustain the deficiencies in tax determined by the Commissioner, as modified by the stipulation of the parties, on the basis that the stock dividends received by the Chandler Trust No. 2 were taxable to the life tenant trustors.

3. In holding that the Chandler Trust No. 2 was, for Federal income tax purposes, a valid trust under the laws of California.

4. In failing and refusing to hold and decide that the Chandler Trust No. 2 was, by virtue of the rights of amendment or modification reserved by the trustors, not a valid trust for Federal income tax purposes and that, accordingly, the taxable stock

dividends received by the trust during the taxable years were taxable to the life tenant trustors under Sections 22(a) and/or Sections 166 and 167 of the Revenue Act of 1938 and the Internal Revenue Code, rather than to the trust itself.

5. In holding that Sections 22(a), 166, and 167 of the Revenue Act of 1938 and the Internal Revenue Code are inapplicable.

6. In denying the Commissioner's motion to reconsider and set aside the Court's findings of fact and opinion.

7. In that its opinion and decision are contrary to the facts as stipulated by the parties.

8. In that its opinion and its decision are contrary to law and the Commissioner's regulations.

/s/ THERON L. CAUDLE,  
Assistant Attorney General.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

Statement of Service attached.

Received and filed May 4, 1950. U. S. C. A.

The Tax Court of the United States

Docket No. 3037

NORMAN CHANDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:PB) dated June 30, 1943, and as a basis of this proceeding alleges as follows:

## I.

Petitioner is an individual residing at 800 West Orange Grove Avenue, Sierra Madre, California. The returns for the period here involved were filed with the Collector for the Sixth District of California.

## II.

The notice of deficiency, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof, was mailed to the petitioner on June 30, 1943.

III.

The taxes in controversy are income taxes for the calendar years 1938 to 1941, inclusive, totaling \$23,205.90.

IV.

The determination of the taxes set forth in said notice of deficiency is based upon the following errors:

(1) Respondent erred in determining deficiencies in income tax for the years 1938 to 1941, inclusive, in the total sum of \$23,205.90.

(2) Respondent erred in adding to petitioner's net taxable income for the year 1938 the sum of \$17,840.29.

(3) Respondent erred in adding to petitioner's net taxable income for the year 1939 the sum of \$7221.48.

(4) Respondent erred in adding to petitioner's net taxable income for the year 1940 the sum of \$8400.59.

(5) Respondent erred in adding to petitioner's net taxable income for the year 1941 the sum of \$13,917.23.

V.

The facts upon which petitioner relies as the basis of this proceeding are as follows:

(1) Petitioner is a resident of the County of

Los Angeles, State of California, and as such filed his income tax returns for each of the years herein involved with the Collector of Internal Revenue for the Sixth Collection District of California.

(2) Petitioner during the years herein involved was a beneficiary under that certain trust designated Trust No. 2, wherein Marian Otis Chandler, May C. Goodan, Constance Chandler (Constance Chandler Crowe), Ruth C. Williamson, Norman Chandler, Harrison G. O. Chandler, Helen C. Garland, and Philip Chandler are designated "present trustees."

(3) Petitioner, as beneficiary, during the year 1938 received as his full and complete share of the distributive net income of said Trust No. 2 the sum of \$8118.59, which he reported in his income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1938 was the sum of \$11,446.46, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$3327.87. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(4) Petitioner, as beneficiary, during the year 1939 received as his full and complete share of the distributive net income of said Trust No. 2 the sum of \$8389.89, which he reported in his income tax



return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1939 was the sum of \$12,418.08, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$4028.19. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(5) Petitioner, as beneficiary, during the year 1940 received as his full and complete share of the distributive net income of said Trust No. 2 the sum of \$9385.93, which he reported in his income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1940 was the sum of \$13,413.66, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$4027.73. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(6) Petitioner, as beneficiary, during the year 1941 received as his full and complete share of the distributive net income of said Trust No. 2 the sum of \$10,527.69, which he reported in his income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1941 was the sum of \$12,563.85, thereby

erroneously and illegally overstating petitioner's net taxable income by the sum of \$2036.16. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(7) Respondent, under date of June 30, 1943, issued a notice of deficiency determining that said Trust No. 2 was an association taxable as a corporation. Under date of June 30, 1943, respondent issued a notice of deficiency determining that Trust No. 1, wherein Harry Chandler, Norman Chandler, and Marian Otis Chandler are designated "present trustees" and petitioner and others are designated "beneficiaries," was an association taxable as a corporation. Petitioner is informed and believes and therefore alleges that the trustees of each of the aforementioned trusts have filed or will file a petition to The United States Tax Court for a redetermination of the deficiencies set forth in said notices, and that the actions of the respondent in determining said trusts to be associations taxable as corporations and in determining the deficiencies herein involved are inconsistent, erroneous, and illegal.

Wherefore, petitioner prays that The Tax Court of The United States hear this petition and redetermine the aforesaid deficiencies in accordance with the rights of the petitioner in the premises and grant

any and all refunds that may be due as a result of such redetermination.

Dated September 20, 1943.

/s/ A. CALDER MACKAY,

/s/ ARTHUR MCGREGOR,

/s/ HOWARD W. REYNOLDS,

Counsel for Petitioner.

State of California

County of Los Angeles—ss.

Norman Chandler, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ NORMAN CHANDLER.

Subscribed and sworn to before me this 20th day of September, 1943.

[Seal]                      /s/ C. O. DENNING,  
Notary Public in and for said County and State.

My commission expires Sept. 3, 1947.

## EXHIBIT A

Form 1279

Treasury Department  
Internal Revenue Service  
417 South Hill Street  
Los Angeles, 13, California.

June 30, 1943

Office of  
Internal Revenue Agent in Charge  
Los Angeles Division

LA:IT:90D:PB

Mr. Norman Chandler,  
800 West Orange Grove Avenue,  
Sierra Madre, California.

Sir:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1938 to 1941, inclusive, discloses a deficiency of \$22,912.83 and \$293.07 in penalty, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C.,

for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,  
Commissioner,

By GEORGE D. MARTIN,  
Internal Revenue Agent in  
Charge.

Enclosures:

Statement

Form of waiver.

## Statement

LA:IT:90D:PB

Mr. Norman Chandler,  
800 West Orange Grove Avenue,  
Sierra Madre, California.

Tax Liability for the Taxable Years Ended  
December 31, 1938 to 1941, Inclusive

## Income Tax

Year	Liability	Assessed	Deficiency	5% Penalty
1938.....	\$ 12,797.82	\$ 6,936.38	\$ 5,861.44	\$293.07
1939.....	17,329.61	14,166.70	3,162.91	
1940.....	25,517.41	21,011.07	4,506.34	
1941.....	55,927.63	46,545.49	9,382.14	
Total.....	\$111,572.47	\$88,659.64	\$22,912.83	\$293.07

This determination of your income tax and penalty liability has been made upon the basis of information on file in this office.

The 5 per cent penalty shown herein for the taxable year ended December 31, 1938, has been asserted in accordance with the provisions of section 293 (a) of the Revenue Act of 1938.

## Adjustments to Net Income

Taxable Year Ended December 31, 1938

Net income as disclosed by return .....\$43,953.95

## Additional income and unallowable deductions:

(a) Salary received .....	\$ 450.00	
(b) Trust income .....	3,003.66	
(c) Rental income .....	221.14	
(d) Long-term capital loss disallowed .....	11,516.00	
(e) Interest disallowed .....	769.70	
(f) Taxes disallowed .....	707.50	
(g) Loss, oil venture, disallowed .....	1,037.50	
(h) Legal expense disallowed .....	134.79	17,840.29

Net income adjusted .....\$61,794.24

## Explanation of Adjustments

(a) You received compensation for personal services from The Times-Mirror Co., in the amount of \$41,550.00, of which your community half is \$20,775.00, whereas the community half reported in your return is \$20,325.00, an understatement of \$450.00.

(b) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1".....	\$17,951.65	\$17,627.44	(\$324.21)
"Chandler Trust No. 2".....	8,118.59	11,446.46	3,327.87
Total .....	<u>\$26,070.24</u>	<u>\$29,073.90</u>	<u>\$3,003.66</u>

(c) The net rental income of \$557.72 reported in your return is increased \$221.14 by the disallowance of \$1,000.00 of the depreciation claimed and the apportionment of one-half of the \$1,557.72 corrected amount of net rental income to your wife's return. The real estate involved was owned by you and your wife as joint tenants.

Depreciation on the Nottingham residence is allowed at the rate of 5% per annum on a basis of \$15,000.00, or an allowance of \$750.00, in lieu of \$1,250.00 claimed, a disallowance of \$500.00. The depreciation of \$500.00 claimed on furniture in said residence is disallowed since the property was rented unfurnished and the furniture was not held for the production of income.

(d) Your claim for a deduction of \$11,516.00 as a long-term capital loss from the sale of 200 shares of Beverly Wilshire Investment Company stock is not allowable.

(e) One-half of the interest of \$1,539.41, paid on loans secured by real estate owned by you and your wife as joint tenants and claimed as a deduction in your return, is disallowed as being deductible by your wife.

(f) One-half of the taxes amounting to \$1,415.01, paid on real estate owned by you and your wife as joint tenants and claimed as a deduction in your return, is disallowed as being deductible by your wife.

(g) The loss of \$2,075.00 claimed under item 18 of your return on account of the R. L. Gilmore Oil Venture is a capital loss subject to the 50% limitation in section 117 of the Revenue Act of 1938.

(h) The legal expense of \$134.79 claimed as a deduction in your return is disallowed as representing a capital expenditure.



## Computation of Alternative Tax

Taxable Year Ended December 31, 1938

Net income adjusted .....		\$61,794.24
Plus: Net long-term capital loss .....		1,037.50
Ordinary net income .....		\$62,831.74
Less: Personal exemption .....	\$ 2,500.00	
Credit for dependents .....	800.00	3,300.00
Balance (surtax net income) .....		\$59,531.74
Less: Interest, item 5 of return .....	\$ 7.50	
Earned income credit .....	1,400.00	1,407.50
Net income subject to normal tax .....		\$58,124.24
Normal tax at 4% on \$58,124.24 .....	\$ 2,324.97	
Surtax on \$59,531.74 .....	10,796.10	
Partial tax .....		\$13,121.07
Minus: 30% of net long-term capital loss .....		311.25
Alternative tax .....		\$12,809.82

## Computation of Tax

Taxable Year Ended December 31, 1938

Net income adjusted .....		\$61,794.24
Less: Personal exemption .....	\$ 2,500.00	
Credit for dependents .....	800.00	3,300.00
Balance (surtax net income) .....		\$58,494.24
Less: Interest, item 5 of return .....	\$ 7.50	
Earned income credit .....	1,400.00	1,407.50
Net income subject to normal tax .....		\$57,086.74
Normal tax at 4% on \$57,086.74 .....	\$ 2,283.47	
Surtax on \$58,494.24 .....	10,432.98	
Total .....		\$12,716.45
Alternative tax .....		\$12,809.82
Total income tax .....		\$12,809.82
Less: Income tax paid at source .....		12.00
Correct income tax liability .....		\$12,797.82
Income tax assessed:		
Original, account No. 832687 .....		6,936.38
Deficiency of income tax .....		\$ 5,861.44
5% penalty .....		\$ 293.07

Adjustments to Net Income

Taxable Year Ended December 31, 1939

Net income as disclosed by return .....\$65,520.24

Additional income and unallowable deductions:

(a) Salary received .....	\$ 498.50	
(b) Trust income .....	3,686.76	
(c) Rental income .....	215.31	
(d) Other income .....	1,149.63	
(e) Interest disallowed .....	768.30	
(f) Taxes disallowed .....	902.98	7,221.48

Net income adjusted .....\$72,741.72

Explanation of Adjustments

(a) You received compensation for personal services from The Times-Mirror Co., in the amount of \$41,897.00, of which your community half is \$20,948.50, whereas the community half reported in your return is \$20,450.00, an understatement of \$498.50.

(b) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1".....	\$21,560.46	\$21,219.03	(\$341.43)
"Chandler Trust No. 2".....	8,389.89	12,418.08	4,028.19
Total .....	\$29,950.35	\$33,637.11	\$3,686.76

(c) The net rental income of \$569.38 reported in your return is increased \$215.31 by the disallowance of \$1,000.00 of the depreciation claimed and the apportionment of one-half of the \$1,569.38 corrected amount of net rental income to your wife's return. The reasons for these adjustments are as stated under adjustment (c) for the year 1938.

(d) The amount of \$1,149.63 received by you from The Times-Mirror Credit Union is held to represent income under the provisions of section 22(a) of the Internal Revenue Code.

(e) One-half of the interest of \$1,536.61, paid on loans secured by real estate owned by you and your wife as joint tenants and claimed as a deduction in your return, is disallowed as being deductible by your wife.

(f) One-half of the taxes amounting to \$1,805.96, paid on real estate owned by you and your wife as joint tenants and claimed as a deduction in your return, is disallowed as being deductible by your wife.

## Computation of Tax

Taxable Year Ended December 31, 1939

Net income adjusted .....	\$72,741.72	
Less: Personal exemption .....	\$ 2,500.00	
Credit for dependents .....	800.00	3,300.00
Balance (surtax net income) .....		\$69,441.72
Less: Earned income credit .....		1,400.00
Net income subject to normal tax .....		\$68,041.72
Normal tax at 4% on \$68,041.72 .....	\$ 2,721.67	
Surtax on \$69,441.72 .....	14,619.94	
Total income tax .....		\$17,341.61
Less: Income tax paid at source .....		12.00
Correct income tax liability .....		\$17,329.61
Income tax assessed:		
Original, account No. 203298 .....		14,166.70
Deficiency of income tax .....		\$ 3,162.91

## Adjustments to Net Income

Taxable Year Ended December 31, 1940

Net income as disclosed by return .....	\$61,018.66	
Additional income and unallowable deductions:		
(a) Dividends received .....	\$1,039.92	
(b) Trust income .....	3,690.40	
(c) Rental income .....	581.73	
(d) Long-term capital loss disallowed .....	1,249.88	
(e) Interest disallowed .....	693.46	
(f) Taxes disallowed .....	905.20	
(g) Bad debts disallowed .....	240.00	8,400.59
Net income adjusted .....		\$69,419.25

Explanation of Adjustments

(a) The amount of dividends reported in your return is understated \$1,039.92 due to the erroneous apportionment to your wife's return of \$963.17 dividends received on stocks owned by you as your separate property, and to the omission of \$75.00 dividends received from Pacific Pipe and Supply Company and \$1.75 dividends received from General Electric Company.

(b) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount reported in your return	Amount determined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1".....	\$23,314.75	\$22,977.42	(\$337.33)
"Chandler Trust No. 2".....	9,385.93	13,413.66	4,027.73
Total .....	\$32,700.68	\$36,391.08	\$3,690.40

(c) The net rental loss of \$163.46 claimed in your return is adjusted to net rental income of \$418.27 by the disallowance of \$1,000.00 of the depreciation claimed and the apportionment of one-half of the \$836.54 corrected amount of net rental income to your wife's return. The reasons for these adjustments are as stated under adjustment (c) for the year 1938.

(d) Your claim for a deduction of \$1,249.88 as a long-term capital loss from the sale of 5 shares of Warner Electric Brake stock is not allowable.

(e) One-half of the interest of \$1,386.92, paid on loans secured by real estate owned by you and your wife as joint tenants and claimed as a deduction in your return, is disallowed as being deductible by your wife.

(f) One-half of the taxes amounting to \$1,810.41, paid on real estate owned by you and your wife as joint tenants and claimed as a deduction in your return, is disallowed as being deductible by your wife.

(g) The deduction claimed in your return for bad debts of Talbot, \$50.00, and Ferguson, \$190.00, are disallowed because these do not represent debts which became worthless within the taxable year.

## Computation of Alternative Tax

Taxable Year Ended December 31, 1940

Net income adjusted .....	\$69,419.25	
Plus: Net long-term capital loss .....	5,875.62	
Ordinary net income .....		\$75,294.87
Less: Personal exemption .....	\$ 2,000.00	
Credit for dependents .....	800.00	2,800.00
Balance (surtax net income) .....		\$72,494.87
Less: Earned income credit .....		1,400.00
Net income subject to normal tax .....		\$71,094.87
Normal tax at 4% on \$71,094.87 .....	\$ 2,843.80	
Surtax on \$72,494.87 .....	22,127.44	
Partial tax .....		\$24,971.24
Minus: 30% of net long-term capital loss .....		1,762.68
Alternative tax .....		\$23,208.56

## Computation of Tax

Taxable Year Ended December 31, 1940

Net income adjusted .....	\$69,419.25	
Less: Personal exemption .....	\$ 2,000.00	
Credit for dependents .....	800.00	2,800.00
Balance (surtax net income) .....		\$66,619.25
Less: Earned income credit .....		1,400.00
Net income subject to normal tax .....		\$65,219.25
Normal tax at 4% on \$65,219.25 .....	\$ 2,608.77	
Surtax on \$66,619.25 .....	19,291.05	
Total normal tax and surtax .....		\$21,899.82
Alternative tax .....		\$23,208.56
Defense tax (10% of \$23,208.56) .....		2,320.85
Total income tax .....		\$25,529.41
Less: Income tax paid at source .....		12.00
Correct income tax liability .....		\$25,517.41
Income tax assessed:		
Original, account No. 203180 .....		21,011.07
Deficiency of income tax .....		\$ 4,506.34

Adjustments to Net Income

Taxable Year Ended December 31, 1941

Net income as disclosed by return .....\$101,145.87

Additional income and unallowable deductions:

(a) Salary received .....	\$	96.62	
(b) Dividends received .....		9,218.38	
(c) Rental income .....		933.06	
(d) Trust income .....		1,702.23	
(e) Interest disallowed .....		543.99	
(f) Taxes disallowed .....		887.95	
(g) Loss disallowed .....		535.00	13,917.23

Net income adjusted .....\$115,063.10

Explanation of Adjustments

(a) You received compensation for personal services from The Times-Mirror Co., in the amount of \$47,174.17, of which your community half is \$23,587.09, whereas the community half reported in your return is \$23,490.47, an understatement of \$96.62.

(b) The amount of dividends reported in your return is understated \$9,218.38 due to the erroneous apportionment to your wife's return of \$9,180.88 dividends received on stocks owned by you as your separate property, and to the omission of \$37.50 dividends received from Pacific Pipe and Supply Company.

(c) The net rental loss of \$866.12 claimed in your return is adjusted to net rental income of \$66.94 by the disallowance of \$1,000.00 of the depreciation claimed and the apportionment of one-half of the \$133.88 corrected amount of net rental income to your wife's return. The reasons for these adjustments are stated under adjustment (c) for the year 1938.

(d) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount reported in your return	Amount determined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1".....	\$23,311.10	\$22,977.17	(\$333.93)
"Chandler Trust No. 2".....	10,527.69	12,563.85	2,036.16
Total .....	\$33,838.79	\$35,541.02	\$1,702.23

(e) One-half of the interest of \$1,087.98, paid on loans secured by real estate owned by you and your wife as joint tenants and claimed as a deduction in your return, is disallowed as being deductible by your wife.

(f) One-half of the taxes amounting to \$1,775.90, paid on real estate owned by you and your wife as joint tenants and claimed as a deduction in your return, is disallowed as being deductible by your wife.

(g) The loss of \$535.00 claimed in your return on account of destruction of one oak tree and two locust trees by storm is disallowed since the amount of loss sustained, if any, has not been substantiated.

### Computation of Alternative Tax

Taxable Year Ended December 31, 1941

Net income adjusted .....	\$115,063.10
Minus: Net long-term capital gain .....	17,003.90
Ordinary net income .....	\$ 98,059.20
Less: Personal exemption .....	\$ 1,500.00
Credit for dependents .....	800.00      2,300.00
Balance (surtax net income) .....	\$ 95,759.20
Less: Earned income credit .....	1,400.00
Net income subject to normal tax .....	\$ 94,359.20
Normal tax at 4% on \$94,359.20 .....	\$ 3,774.37
Surtax on \$95,759.20 .....	47,065.89
Partial tax .....	\$ 50,840.26
Plus: 30% of net long-term capital gain .....	5,101.17
Alternative tax .....	\$ 55,941.43



## Computation of Tax

Taxable Year Ended December 31, 1941

Net income adjusted .....		\$115,063.10
Less: Personal exemption .....	\$ 1,500.00	
Credit for dependents .....	800.00	2,300.00
		<hr/>
Balance (surtax net income) .....		\$112,763.10
Less: Earned income credit .....		1,400.00
		<hr/>
Net income subject to normal tax .....		\$111,363.10
Normal tax at 4% on \$111,363.10 .....	\$ 4,454.52	
Surtax on \$112,763.10 .....	58,076.02	
		<hr/>
Total .....		\$ 62,530.54
Alternative tax .....		\$ 55,941.43
Total income tax .....		\$ 55,941.43
Less: Income tax paid at source .....		13.80
		<hr/>
Correct income tax liability .....		\$ 55,927.63
Income tax assessed:		
Original .....		46,545.49
		<hr/>
Deficiency of income tax .....		\$ 9,382.14

Received and filed Sept. 27, 1943, T.C.U.S.

[Title of Tax Court and Cause.]

Docket No. 3037

### ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I and II. Admits the allegations contained in paragraphs I and II of the petition.

III. Admits that the taxes in controversy are income taxes for the calendar years 1938 to 1941, inclusive, but denies that the total of the proposed deficiencies aggregating \$23,205.90 is in controversy.

IV. (1) to (5), inclusive. Denies that the respondent erred as alleged in subparagraphs (1) to (5), inclusive, of paragraph IV of the petition.

V. (1) and (2). Admits the allegations contained in subparagraphs (1) and (2) of paragraph V of the petition.

(3). Admits that petitioner in his income tax return for the year 1938 reported \$8,118.59 as income from Trust No. 2. Admits that respondent determined that the amount reportable by petitioner from said source was \$11,446.46 and accordingly increased net taxable income reported by petitioner by the sum of \$3,327.87. Denies that the respondent's determination is erroneous and denies the

remaining allegations contained in subparagraph (3) of paragraph V of the petition.

(4). Admits that petitioner in his income tax return for the year 1939 reported \$8,389.89 as income from Trust No. 2. Admits that respondent determined that the amount reportable by petitioner from said source was \$12,418.08 and accordingly increased net taxable income reported by petitioner by the sum of \$4,028.19. Denies that the respondent's determination is erroneous and denies the remaining allegations contained in subparagraph (4) of paragraph V of the petition.

(5). Admits that petitioner in his income tax return for the year 1940 reported \$9,385.93 as income from Trust No. 2. Admits that respondent determined that the amount reportable by petitioner from said source was \$13,413.66 and accordingly increased net taxable income reported by petitioner by the sum of \$4,027.73. Denies that the respondent's determination is erroneous and denies the remaining allegations contained in subparagraph (5) of paragraph V of the petition.

(6). Admits that petitioner in his income tax return for the year 1941 reported \$10,527.69 as income from Trust No. 2. Admits that respondent determined that the amount reportable by petitioner from said source was \$12,563.85 and accordingly increased net taxable income reported by petitioner by the sum of \$2,036.16. Denies that the respondent's determination is erroneous and denies the

remaining allegations contained in subparagraph (6) of paragraph V of the petition.

(7). Denies the allegations contained in subparagraph (7) of paragraph V of the petition.

VI. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,  
Chief Counsel,  
Bureau of Internal  
Revenue.

Of Counsel:

B. H. NEBLETT,  
Division Counsel.

HAROLD D. THOMAS,  
Special Attorney,  
Bureau of Internal  
Revenue.

Received and filed Nov. 17, 1943 T. C. U. S.

The Tax Court of the United States  
Washington

Docket No. 3037

NORMAN CHANDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION

Pursuant to the Opinion of this Court, promulgated May 23, 1949, it is

Ordered and decided: That there are deficiencies in income tax for the calendar years 1938, 1939, 1940 and 1941 in the respective amounts of \$4,529.52, \$918.09, \$1,218.56, and \$1,840.23, and that there is no penalty liability for the calendar year 1938 under section 293 (a), Revenue Act of 1938.

/s/ WILLIAM W. ARNOLD,  
Judge.

Entered May 24, 1949.

Served May 25, 1949.

In the United States Court of Appeals  
for the Ninth Circuit

T. C. Docket No. 3037

COMMISSIONER OF INTERNAL REVENUE,  
Petitioner on Review,

vs.

NORMAN CHANDLER,  
Respondent on Review.

### PETITION FOR REVIEW

To the Honorable Judges of the United States Court  
of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on November 30, 1949 "That there are deficiencies in income tax for the calendar years 1938, 1939, 1940 and 1941 in the respective amounts of \$4,592.52, \$918.09, \$1,218.56, and \$1,840.23" in respect of the Federal income tax liability of Norman Chandler, the above-named respondent on review. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The respondent on review, Norman Chandler, is a resident of Sierra Madre, California, and filed his Federal income tax returns for the years 1938, 1939, 1940 and 1941 with the Collector of Internal Revenue for the Sixth District of California, whose office is in Los Angeles, California, and within the juris-

diction of the United States Court of Appeals for the Ninth Circuit wherein this review is sought.

## NATURE OF CONTROVERSY

The issue presented to and passed upon by The Tax Court of the United States and which was decided contrary to the Commissioner's determination is whether certain taxable stock dividends which were received by Chandler Trust No. 2, of which trust the respondent on review was one of the life tenant trustors, are taxable to the life tenant trustors of the trust, as determined by the Commissioner, or, as claimed by the taxpayer, to the trust itself. The Tax Court held, contrary to the Commissioner's determination, that Sections 22(a), 166, and 167 of the Revenue Act of 1938 and the Internal Revenue Code are inapplicable and that the stock dividends in question are taxable to the trust rather than to the life tenant beneficiaries and trustors. The Commissioner's determination in this and related cases was thus disapproved in so far as it reflected the Commissioner's inclusion of an allocate portion of the taxable stock dividends in the taxable income of each of the life tenant trustors for the years here involved.

/s/ THERON L. CAUDLE,  
Assistant Attorney General.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue, Attorneys for the Petitioner on Review.

Received and filed Feb. 17, 1950, U. S. C. A.



[Title of Court of Appeals and Cause.]

Docket No. 3037.

### STATEMENT OF POINTS

Comes now the Commissioner of Internal Revenue, petitioner on review in the above-entitled cause, by and through his attorneys, Theron L. Caudle, Assistant Attorney General, and Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and hereby states that he intends to rely upon the following points in this proceeding:

The Tax Court of the United States erred:

1. In ordering and deciding that there are deficiencies in income tax for the calendar years 1938, 1939, 1940 and 1941 in the respective amounts of only \$4,592.52, \$918.09, \$1,218.56, and \$1,840.23.

2. In failing and refusing to sustain the deficiencies in tax determined by the Commissioner, as modified by the stipulation of the parties, on the basis that the stock dividends received by the Chandler Trust No. 2 were taxable to the life tenant trustors.

3. In holding that the Chandler Trust No. 2 was, for Federal income tax purposes, a valid trust under the laws of California.

4. In failing and refusing to hold and decide that the Chandler Trust No. 2 was, by virtue of the rights of amendment or modification reserved by the

trustors, not a valid trust for Federal income tax purposes and that, accordingly, the taxable stock dividends received by the trust during the taxable years were taxable to the life tenant trustors under Sections 22(a) and/or Sections 166 and 167 of the Revenue Act of 1938 and the Internal Revenue Code, rather than to the trust itself.

5. In holding that Sections 22 (a), 166, and 167 of the Revenue Act of 1938 and the Internal Revenue Code are inapplicable.

6. In denying the Commissioner's motion to reconsider and set aside the Court's findings of fact and opinion.

7. In that its opinion and decision are contrary to the facts as stipulated by the parties.

8. In that its opinion and its decision are contrary to law and the Commissioner' regulations.

/s/ THERON L. CAUDLE,  
Assistant Attorney General.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

Statement of service attached.

Received and filed May 4, 1950 U. S. C. A.

The Tax Court of the United States

Docket No. 3038

PHILIP CHANDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:PB) dated June 30, 1943, and as a basis of this proceeding alleges as follows:

I.

Petitioner is an individual residing at 2531 North Catalina Street, Los Angeles, California. The returns for the period here involved were filed with the Collector for the Sixth District of California.

II.

The notice of deficiency, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof, was mailed to the petitioner on June 30, 1943.

III.

The taxes in controversy are income taxes for the

calendar years 1938 to 1941, inclusive, totaling \$7025.11.

#### IV.

The determination of the taxes set for in said notice of deficiency is based upon the following errors:

(1) Respondent erred in determining deficiencies in income tax for the years 1938 to 1941, inclusive, in the total sum of \$7025.11.

(2) Respondent erred in adding to petitioner's net taxable income for the year 1938 the sum of \$5642.73.

(3) Respondent erred in adding to petitioner's net taxable income for the year 1939 the sum of \$6758.15.

(4) Respondent erred in adding to petitioner's net taxable income for the year 1940 the sum of \$4692.34.

(5) Respondent erred in adding to petitioner's net taxable income for the year 1941 the sum of \$4129.34.

#### V.

The facts upon which petitioner relies as the basis of this proceeding are as follows:

(1) Petitioner is a resident of the County of Los Angeles, State of California, and as such filed his income tax returns for each of the years herein

involved with the Collector of Internal Revenue for the Sixth Collection District of California.

(2) Petitioner during the years herein involved was a beneficiary under that certain trust designated Trust No. 2, wherein Marian Otis Chandler, May C. Goodan, Constance Chandler (Constance Chandler Crowe), Ruth C. Williamson, Norman Chandler, Harrison G. O. Chandler, Helen C. Garland, and Philip Chandler are designated "present trustees."

(3) Petitioner, as beneficiary, during the year 1938 received as his full and complete share of the distributive net income of said Trust No. 2 the sum of \$8118.57, which he reported in his income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1938 was the sum of \$11,446.46, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$3327.89. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(4) Petitioner, as beneficiary, during the year 1939 received as his full and complete share of the distributive net income of said Trust No. 2 the sum of \$8726.32, which he reported in his income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1939 was the sum of \$12,-

418.08, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$3,-691.76. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(5) Petitioner, as beneficiary, during the year 1940 received as his full and complete share of the distributive net income of said Trust No. 2 the sum of \$9385.93, which he reported in his income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1940 was the sum of \$13,413.66, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$4027.73. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(6) Petitioner, as beneficiary, during the year 1941 received as his full and complete share of the distributive net income of said Trust No. 2 the sum of \$10,527.69, which he reported in his income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1941 was the sum of \$12,563.85, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$2,306.16. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(7) Respondent, under date of June 30, 1943, issued a notice of deficiency determining that said Trust No. 2 was an association taxable as a corporation. Under date of June 30, 1943, respondent issued a notice of deficiency determining that Trust No. 1, wherein Harry Chandler, Norman Chandler, and Marian Otis Chandler are designated "present trustees" and petitioner and others are designated "beneficiaries," was an association taxable as a corporation. Petitioner is informed and believes and therefore alleges that the trustees of each of the aforementioned trusts have filed or will file a petition to The United States Tax Court for a redetermination of the deficiencies set forth in said notices, and that the actions of the respondent in determining said trusts to be associations taxable as corporations and in determining the deficiencies herein involved are inconsistent, erroneous, and illegal.

Wherefore, petitioner prays that The Tax Court of the United States hear this petition and redetermine the aforesaid deficiencies in accordance with the rights of the petitioner in the premises and grant any and all refund that may be due as a result of such redetermination.

Dated September 20, 1943.

/s/ A. CALDER MACKAY,

/s/ ARTHUR McGREGOR,

/s/ HOWARD W. REYNOLDS,

Counsel for Petitioner.



State of California

County of Los Angeles—ss.

Philip Chandler, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ PHILIP CHANDLER.

Subscribed and sworn to before me this 23rd day of September, 1943.

[Seal]                   /s/ MARY E. WHITTHORNE,  
Notary Public in and for said County and State.

My commision expires November 26, 1945.

## EXHIBIT A

Form 1279

Treasury Department

Internal Revenue Service  
417 South Hill Street  
Los Angeles 13, California

June 30, 1943

Office of  
Internal Revenue Agent in Charge  
Los Angeles Division  
LA:IT:90D:PB

Mr. Philip Chandler,  
2531 North Catalina Street,  
Los Angeles, California

Sir:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1938 to 1941 inclusive discloses a deficiency of \$7,025.11 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C.,

for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,  
Commissioner,

By GEORGE D. MARTIN,  
Internal Revenue Agent in  
Charge.

Enclosures:

Statement

Form of waiver.

## Statement

LA:IT:90D:PB

Mr. Philip Chandler,  
2531 North Catalina Street,  
Los Angeles, California.

Tax Liability for the Taxable Years Ended  
December 31, 1938, to 1941, Inclusive

## Income Tax

Year	Liability	Assessed	Deficiency
1938.....	\$ 4,025.74	\$ 2,762.09	\$1,263.65
1939.....	5,624.53	4,047.30	1,577.23
1940.....	11,189.99	9,256.84	1,933.15
1941.....	19,839.03	17,587.95	2,251.08
Total.....	\$40,679.29	\$33,654.18	\$7,025.11

This determination of your income tax liability has been made upon the basis of information on file in this office.

If you do not acquiesce in all of the adjustments making up the deficiency indicated, but desire to stop the accumulation of interest on that part of the deficiency resulting from adjustments to which you agree, please fill out the enclosed form of waiver, inserting therein the amount of the deficiency you desire to have assessed at once. The execution of the form for the agreed portion of the deficiency will not deprive you of your right to petition The Tax Court of the United States for a redetermination of the deficiency.

## Adjustments to Net Income

## Taxable Year Ended December 31, 1938

Net income as disclosed by return .....	\$26,874.34
Additional income and unallowable deductions:	
(a) Trust income .....	\$ 3,003.67
(b) Long-term capital losses .....	2,639.06      5,642.73
Net income adjusted .....	\$32,517.07

Explanation of Adjustments

(a) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1".....	\$17,951.66	\$17,627.44	\$(324.22)
"Chandler Trust No. 2".....	8,118.57	11,446.46	3,327.89
Total .....	\$26,070.23	\$29,073.90	\$3,003.67

(b) The following long-term capital losses claimed in your return are disallowed for lack of substantiation of basis of the securities sold:

Los Angeles Improvement No. 112 .....	\$ 500.00
San Luis Obispo Road Improvement No. 12 .....	1,600.00

Total .....\$2,100.00

In lieu of the long-term capital loss of \$395.85 claimed from the sale of Trustees Standard Oil Shares "B" for \$820.80, there is determined a long-term capital gain of \$143.21 from such sale, resulting in an adjustment of \$539.06.

These adjustments result in the addition to income of the amount of \$2,639.06.

Computation of Tax

Taxable Year Ended December 31, 1938

Net income adjusted .....	\$32,517.07
Less: Personal exemption .....	\$ 2,500.00
Credit for dependents .....	633.33 3,133.33
Balance (surtax net income) .....	\$29,383.74
Less: Interest on U.S. obligations .....	\$ 12.90
Earned income credit .....	300.00 312.90
Net income subject to normal tax .....	\$29,070.84
Normal tax at 4% on \$29,070.84 .....	\$ 1,162.83
Surtax on \$29,384.74 .....	2,882.91
Total income tax .....	\$ 4,045.74
Less: Income tax paid at source .....	20.00
Correct income tax liability .....	\$ 4,025.74
Income tax assessed:	
Original, account No. 203934 .....	2,762.09
Deficiency of income tax .....	\$ 1,263.65

## Adjustments to Net Income

Taxable Year Ended December 31, 1939

Net income as disclosed by return .....	\$32,806.73
Additional income and unallowable deductions:	
(a) Dividends received .....	\$ 195.00
(b) Interest received .....	256.17
(c) Trust income .....	3,350.33
(d) Long-term capital losses .....	2,956.65
	<u>6,758.15</u>
Total .....	\$39,564.88
Additional deduction:	
(e) Interest paid .....	249.74
	<u>249.74</u>
Net income adjusted .....	\$39,315.14

## Explanation of Adjustments

(a) The following dividends received are added to income:

American Aviation Company .....	\$ 25.00
Union Oil Company of California .....	20.00
Manhattan Company .....	25.00
Chrysler Corporation .....	125.00

Total .....	\$195.00
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(b) The following interest received is added to income:

Indiana Service Corporation .....	\$125.00
Interstate Power Company .....	75.00
Foreman and Clark .....	4.17
Mortgage Guarantee Co. ....	8.94
New England Gas & Electric Co. ....	43.06

Total .....	\$256.17
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(c) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1" .....	\$21,560.46	\$21,219.03	\$(341.43)
"Chandler Trust No. 2" .....	8,726.32	12,418.08	3,691.76
Total .....	\$30,286.78	\$33,637.11	\$3,350.33

(d) The following long-term capital losses claimed in your return are disallowed for lack of substantiation of the basis of the securities sold:

Foreman & Clark bonds .....	\$1,450.00
Girls Collegiate School First Mortgage bonds .....	197.50
Mortgage Guarantee Certificate .....	209.82
New England Gas & Electric Co. bonds .....	833.40
Total .....	<u>\$2,690.72</u>

The long-term capital loss of \$506.25 claimed in your return on account of worthlessness of Discount Corp. of California (3 units) acquired by you in 1932, is disallowed because the stock did not become worthless during the taxable year and no loss was sustained with respect thereto during the taxable year, and for the further reason that the basis of the stock has not been substantiated.

In lieu of the short-term capital loss of \$2,591.30 claimed from the sale of 100 shares of State Street Investment Corporation stock (not taken into deductions claimed in determining net income for this taxable year), gains and losses from said sale are determined as follows, the loss of \$240.32 being applied against the additions to income mentioned under this adjustment:

No. of shares	Date acquired	Cost	Sale price	Gain (loss)	Gain (loss) taken into account	
					Percentage	Amount
25	9/21/34.....	\$1,592.25	\$1,652.18	\$ 59.93	50	\$ 29.97
14	1/ 4/37.....	1,465.80	925.22	(540.58)	50	(270.29)
Net long-term capital loss from sale of 39 shares .....						\$(240.32)
61	10/ 1/37.....	\$5,612.00	\$4,031.30	(1,580.70)	100	(1,580.70)

These adjustments result in the addition to income of the net amount of \$2,956.65.

(e) An additional deduction for interest is allowed in the amount of \$249.74.



## Computation of Tax

Taxable Year Ended December 31, 1939

Net income adjusted .....		\$39,315.14
Less: Personal exemption .....	\$ 2,500.00	
Credit for dependents .....	800.00	3,300.00
		<hr/>
Balance (surtax net income) .....		\$36,015.14
Less: Earned income credit .....		360.00
		<hr/>
Net income subject to normal tax .....		\$35,655.14
Normal tax at 4% on \$35,655.14 .....	\$ 1,426.20	
Surtax on \$36,015.14 .....	4,223.18	
		<hr/>
Total income tax .....		\$ 5,649.38
Less: Income tax paid at source .....		24.85
		<hr/>
Correct income tax liability .....		\$ 5,624.53
Income tax assessed:		
Original, account No. 203029 .....		4,047.30
		<hr/>
Deficiency of income tax .....		\$ 1,577.23

## Adjustments to Net Income

Taxable Year Ended December 31, 1940

Net income as disclosed by return .....		\$39,978.93
Additional income and unallowable deductions:		
(a) Interest received .....	\$ 97.63	
(b) Trust income .....	3,690.41	
(c) Short-term capital gain .....	236.33	
(d) Long-term capital gain .....	667.97	4,692.34
		<hr/>
Total .....		\$44,671.27
Additional deduction:		
(e) Interest paid .....		97.92
		<hr/>
Net income adjusted .....		\$44,573.35

Explanation of Adjustments

(a) The following interest received is added to income :

Interstate Power Company .....	\$36.66
Indiana Service Corporation .....	60.97

Total .....\$97.63

(b) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1".....	\$23,314.74	\$22,977.42	\$(337.32)
"Chandler Trust No. 2".....	9,385.93	13,413.66	4,027.73
Total .....	\$32,700.67	\$36,391.08	\$3,690.41

(c) The net short-term capital gain reported in your return is increased \$236.33, as follows:

Item	Short-term capital gain (loss) reported	Short-term capital gain (loss) corrected	Addition to income (reduction)
1. Illinois Iowa Power Co. ....	\$ 716.81	\$ 0.00	\$(716.81)
2. Interstate Power Co. ....	(94.66)	(35.08)	59.58
3. Indiana Service Corp. ....	(134.93)	(16.18)	118.75
4. Portland Gas & Coke Co. ....	163.38	203.66	40.28
5. State Street Investment Corp....	(2,591.30)	(1,580.70)	1,010.60
6. Dunningcolor Corp. ....	0.00	44.80	44.80
7. Pure Oil Co. ....	0.00	(320.87)	(320.87)
Net addition .....			\$ 236.33

1. In lieu of the short-term capital gain of \$716.81 reported from the sale of 100 shares of Illinois Iowa Power Co. stock, a long-term capital gain from the sale thereof has been determined in the amount of \$599.45, as follows:

No. of shares	Date acquired	Date sold	Cost	Sale price	Gain	Gain taken into account Percent.	Amt.
50	12/16/38	11/27/40..	\$964.40	\$1,408.67	\$444.27	66 $\frac{2}{3}$	\$296.18
50	12/16/38	11/28/40..	964.40	1,419.30	454.90	66 $\frac{2}{3}$	303.27
Total .....			\$1,928.80	\$2,827.97	\$899.17		\$599.45

2. The cost of \$3,000.00 of bonds of Interstate Power Co. has been determined as \$1,943.83, in lieu of \$2,003.41 claimed in your return, a difference of \$59.58.

3. The cost of \$5,000.00 of bonds of Indiana Service Corp. has been determined as \$3,169.25, in lieu of \$3,288.00 claimed in your return, a difference of \$118.75.

4. The cost of \$2,000.00 of bonds of Portland Gas & Coke Co. has been determined as \$1,608.42, in lieu of \$1,648.70 claimed in your return, a difference of \$40.28.

5. As a result of the sale in the preceding year of 100 shares of State Street Investment Corporation stock there is added to the net short-term capital loss carry-over from that year the amount of \$1,580.70 as shown under adjustment (d) for the preceding year.

6. You failed to include in the net short-term capital loss carry-over a gain of \$44.80 from the sale on June 5, 1939 of 300 shares of Dunningcolor Corporation stock for \$344.88, acquired May 18, 1939, for \$300.00.

7. You failed to include in the net short-term capital loss carry-over a loss of \$320.87 from the sale on March 3, 1939, of 100 shares of Pure Oil Company stock for \$921.93, acquired October 13, 1937, for \$1,242.80.

(d) The addition to income of \$667.97 results from the following adjustments:

1. Illinois Iowa Power Co. ....	\$599.45
2. Loss, Central Investment Co. bonds, disallowed .....	50.00
3. Adjustment of loss, Celanese Corp. of America .....	18.52
Total .....	<u>\$667.97</u>

1. See adjustment (c) 1. for this year.

2. The loss of \$50.00 claimed from the sale of \$2,000.00 of bonds of Central Investment Company acquired by you in 1932 is disallowed for lack of substantiation of the basis of the securities sold.

3. Due to an overstatement of \$37.04 in the cost claimed of 50 shares of Celanese Corp. of America stock a long-term capital gain of \$7.00 is determined from the sale, in lieu of the long-term capital loss of \$11.52 claimed in your return, a difference of \$18.52.

(e) An additional deduction for interest is allowed in the amount of \$97.92.

Computation of Alternative Tax

Taxable Year Ended December 31, 1940

Net income adjusted .....		\$44,573.35
Minus: Net long-term capital gain .....		298.93
Ordinary net income .....		<u>\$44,274.42</u>
Less: Personal exemption .....	\$ 2,000.00	
Credit for dependents .....	800.00	2,800.00
Balance (surtax net income) .....		<u>\$41,474.42</u>
Less: Earned income credit .....		422.50
Net income subject to normal tax .....		<u>\$41,051.92</u>
Normal tax at 4% on \$41,051.92 .....	\$ 1,642.08	
Surtax on \$41,474.42 .....	8,470.79	
Partial tax .....		<u>\$10,112.87</u>
Plus: 30% of net long-term capital gain .....		89.68
Alternative tax .....		<u>\$10,202.55</u>

Computation of Tax

Taxable Year Ended December 31, 1940

Net income adjusted .....		\$44,573.35
Less: Personal exemption .....	\$ 2,000.00	
Credit for dependents .....	800.00	2,800.00
Balance (surtax net income) .....		<u>\$41,773.35</u>
Less: Earned income credit .....		422.50
Net income subject to normal tax .....		<u>\$41,350.85</u>
Normal tax at 4% on \$41,350.85 .....	\$ 1,654.03	
Surtax on \$41,773.35 .....	8,578.41	
Total .....		<u>\$10,232.44</u>
Alternative tax .....		\$10,202.55
Defense tax (10% of \$10,202.55) .....		1,020.25
Total income tax .....		<u>\$11,222.80</u>
Less: Income tax paid at source .....		32.81
Correct income tax liability .....		<u>\$11,189.99</u>
Income tax assessed:		
Original, account No. 203488 .....		9,256.84
Deficiency of income tax .....		<u>\$ 1,933.15</u>

## Adjustments to Net Income

Taxable Year Ended December 31, 1941

Net income as disclosed by return .....	\$46,641.06
Additional income and unallowable deductions:	
(a) Dividends received .....	\$ 1,769.45
(b) Short-term capital gain .....	97.92
(c) Long-term capital gain .....	559.74
(d) Trust income .....	1,702.23
	<u>4,129.34</u>
Net income adjusted .....	\$50,770.40

## Explanation of Adjustments

(a) You failed to report a dividend received from Chandis Securities Company in the amount of \$1,769.45.

(b) The short-term capital gain from the sale of St. Louis Public Service bonds is increased \$97.92 due to an overstatement of cost in that amount.

(c) The long-term capital loss of \$123.00 claimed in your return from the sale of bonds of Central Investment Company is disallowed for lack of substantiation of the basis of the securities sold.

In lieu of the long-term capital gain of \$1,946.40 reported from the sale of 300 shares of Illinois Iowa Power preferred stock, there is determined long-term capital gain of \$2,018.98 from such sale (an addition of \$72.58), as follows:

No. of shares	Date acquired	Cost	Sale price	Gain (loss)	Gain (loss) taken into account	
					Percentage	Amount
50	2/ 2/39.....	\$1,130.86	\$1,552.79	\$421.93	50	\$ 210.97
50	5/ 9/39.....	898.30	1,552.79	654.49	66 $\frac{2}{3}$	436.33
50	5/ 9/39.....	898.30	1,533.70	635.40	66 $\frac{2}{3}$	423.61
50	6/ 6/39.....	1,030.42	1,533.70	503.28	66 $\frac{2}{3}$	335.52
100	8/17/39.....	2,161.08	3,079.90	918.82	66 $\frac{2}{3}$	612.55
Total .....						<u>\$2,018.98</u>

In lieu of the long-term capital gain of \$98.56 reported from the sale of 500 shares of Richfield Oil Co. stock, there is determined long-term capital gain of \$462.72 from such sale (an addition of \$364.16), as follows:

No. of shares	Date acquired	Cost	Sale price	Gain (loss)	Gain (loss) taken into account	
					Percentage	Amount
63	3/20/37.....	\$ 752.06				
2	6/ 5/37.....	19.62				
35	12/17/38.....	320.58				
100	1/ 4/39.....	933.06				
<hr/>						
200	Total .....	\$2,025.32	\$2,250.45	\$225.13	50	\$112.57
100	1/ 4/39.....	933.06	1,174.97	241.91	50	120.95
200	2/ 2/39.....	1,891.55	2,349.95	458.40	50	229.20
<hr/>						
Total .....	\$462.72					

These adjustments result in the addition to income of \$559.74.

(d) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1".....	\$23,311.10	\$22,977.17	\$(333.93)
"Chandler Trust No. 2".....	10,527.69	12,563.85	2,036.16
<hr/>			
Total .....	\$33,838.79	\$35,541.02	\$1,702.23

### Computation of Alternative Tax

Taxable Year Ended December 31, 1941

Net income adjusted .....	\$50,770.40
Minus: Net long-term capital gain .....	2,046.70
<hr/>	
Ordinary net income .....	\$48,723.70
Less: Personal exemption .....	\$ 1,500.00
Credit for dependents .....	800.00    2,300.00
<hr/>	
Balance (surtax net income) .....	\$46,423.70
Less: Earned income credit .....	542.50
<hr/>	
Net income subject to normal tax .....	\$45,881.20
Normal tax at 4% on \$45,881.20 .....	\$ 1,835.25
Surtax on \$46,423.70 .....	17,413.04
<hr/>	
Partial tax .....	\$19,248.29
Plus: 30% of net long-term capital gain .....	614.01
<hr/>	
Alternative tax .....	\$19,862.30

## Computation of Tax

Taxable Year Ended December 31, 1941

Net income adjusted .....		\$50,770.40
Less: Personal exemption .....	\$ 1,500.00	
Credit for dependents .....	800.00	2,300.00
		<hr/>
Balance (surtax net income) .....		\$48,470.40
Less: Earned income credit .....		542.50
		<hr/>
Net income subject to normal tax .....		\$47,927.90
Normal tax at 4% on \$47,927.90 .....	\$ 1,917.12	
Surtax on \$48,470.40 .....	18,538.72	
		<hr/>
Total .....		\$20,455.84
Alternative tax .....		\$19,862.30
Total income tax .....		\$19,862.30
Less: Income tax paid at source .....		23.27
		<hr/>
Correct income tax liability .....		\$19,839.03
Income tax assessed:		
Original, account No. 312448 .....		17,587.95
		<hr/>
Deficiency of income tax .....		\$ 2,251.08

Received and filed Sept. 27, 1943, T.C.U.S.

[Title of Tax Court and Cause.]

Docket No. 3038.

## ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

## I. and II.

Admits the allegations contained in paragraphs I and II of the petition.



. III.

Admits that the taxes in controversy are income taxes for the calendar years 1938 to 1941, inclusive, but denies that the total of the proposed deficiencies, aggregating \$7,025.11, is in controversy.

IV.

(1) to (5), inclusive. Denies that the respondent erred as alleged in subparagraphs (1) to (5), inclusive, of paragraph IV of the petition.

V.

(1) and (2) Admits the allegations contained in subparagraphs (1) and (2) of paragraph V of the petition.

(3) Admits that petitioner, in his income tax return for 1938, reported \$8,118.57 as income from Trust No. 2. Admits that respondent determined that the amount reportable from said source was \$11,446.46, and accordingly increased taxable net income reported by petitioner by \$3,327.89. Denies that respondent's determination was erroneous, and denies the remaining allegations contained in subparagraph (3) of paragraph V of the petition.

(4) Admits that petitioner, in his income tax return for 1939, reported \$8,726.32 as income from Trust No. 2. Admits that respondent determined that the amount reportable from said source was \$12,418.08, and accordingly increased taxable net

income reported by petitioner by \$3,691.76. Denies that respondent's determination was erroneous, and denies the remaining allegations contained in subparagraph (4) of paragraph V of the petition.

(5) Admits that petitioner, in his income tax return for 1940, reported \$9,385.93 as income from Trust No. 2. Admits that respondent determined that the amount reportable from said source was \$13,413.66, and accordingly increased taxable net income reported by petitioner by \$4,027.73. Denies that respondent's determination was erroneous, and denies the remaining allegations contained in subparagraph (5) of paragraph V of the petition.

(6) Admits that petitioner, in his income tax return for 1941, reported \$10,527.69 as income from Trust No. 2. Admits that respondent determined that the amount reportable from said source was \$12,563.85, and accordingly increased taxable net income reported by petitioner by \$2,036.16. Denies that respondent's determination was erroneous, and denies the remaining allegations contained in subparagraph (6) of paragraph V of the petition.

(7) Denies the allegations contained in subparagraph (7) of paragraph V of the petition.

## VI.

Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,  
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,  
Division Counsel.

HAROLD D. THOMAS,  
Special Attorney,  
Bureau of Internal Revenue.

Received and filed Nov. 17, 1943 T. C. U. S.

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The Tax Court of the United States  
Washington

Docket No. 3038

PHILIP CHANDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DECISION

Pursuant to the Opinion of this Court promulgated May 23, 1949, it is

Ordered and Decided: That there are deficiencies in income tax for the calendar years 1939, 1940 and 1941 in the respective amounts of \$407.21; \$300.00; and \$1,209.86; and that there is an overpayment in income tax for the calendar year 1938 in the amount of \$13.79, which overpayment was made within three years before the execution of an agreement or the filing of a petition.

[Seal]        /s/ WILLIAM W. ARNOLD,  
Judge.

Entered Nov. 30, 1949.

Served Dec. 1, 1949.

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In the United States Court of Appeals  
for the Ninth Circuit

T. C. Docket No. 3038

COMMISSIONER OF INTERNAL REVENUE,  
Petitioner on Review,

vs.

PHILIP CHANDLER,  
Respondent on Review.

PETITION FOR REVIEW

To the Honorable Judges of the United States Court  
of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby  
petitions the United States Court of Appeals for the

Ninth Circuit to review the decision entered by The Tax Court of the United States on November 30, 1949, "That there are deficiencies in income tax for the calendar years 1939, 1940 and 1941 in the respective amounts of \$407.21; \$300.00; and \$1,209.86; and that there is an overpayment in income tax for the calendar year 1938 in the amount of \$13.79" in respect of the Federal income tax liability of Philip Chandler, the above-named respondent on review. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The respondent on review, Philip Chandler, is a resident of Los Angeles, California, and filed his Federal income tax returns for the years 1938, 1939, 1940 and 1941 with the Collector of Internal Revenue for the Sixth District of California, whose office is in Los Angeles, California, and within the jurisdiction of the United States Court of Appeals for the Ninth Circuit wherein this review is sought.

### Nature of Controversy

The issue presented to and passed upon by The Tax Court of the United States and which was decided contrary to the Commissioner's determination is whether certain taxable stock dividends which were received by Chandler Trust No. 2, of which trust the respondent on review was one of the life tenant trustors, are taxable to the life tenant trustors of the trust, as determined by the Commissioner, or, as claimed by the taxpayer, to the trust

itself. The Tax Court held, contrary to the Commissioner's determination, that Sections 22(a), 166, and 167 of the Revenue Act of 1938 and the Internal Revenue Code are inapplicable and that the stock dividends in question are taxable to the trust rather than to the life tenant beneficiaries and trustors. The Commissioner's determination in this and related cases was thus disapproved in so far as it reflected the Commissioner's inclusion of an allocate portion of the taxable stock dividends in the taxable income of each of the life tenant trustors for the years here involved.

/s/ THERON L. CAUDLE,  
Assistant Attorney General

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue, Attor-  
neys for the Petitioner on Review.

Received and filed Feb. 17, 1950 T.C.U.S.

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[Title of Court of Appeals and Cause.]

T. C. Docket No. 3038

### STATEMENT OF POINTS

Comes now the Commissioner of Internal Revenue, petitioner on review in the above-entitled cause, by and through his attorneys, Theron L. Caudle, Assistant Attorney General, and Charles Oli-

phant, Chief Counsel, Bureau of Internal Revenue, and hereby states that he intends to rely upon the following points in this proceeding:

The Tax Court of the United States erred:

1. In ordering and deciding that there are deficiencies in income tax for the calendar years 1939, 1940 and 1941 in the respective amounts of \$407.21, \$300.00, and \$1,209.86; and that there is an overpayment in income tax for the calendar year 1938 in the amount of \$13.79.

2. In failing and refusing to sustain the deficiencies in tax determined by the Commissioner, as modified by the stipulation of the parties, on the basis that the stock dividends received by the Chandler Trust No. 2 were taxable to the life tenant trustors.

3. In holding that the Chandler Trust No. 2 was, for Federal income tax purposes, a valid trust under the laws of California.

4. In failing and refusing to hold and decide that the Chandler Trust No. 2 was, by virtue of the rights of amendment or modification reserved by the trustors, not a valid trust for Federal income tax purposes and that, accordingly, the taxable stock dividends received by the trust during the taxable years were taxable to the life tenant trustors under Sections 22(a) and/or Sections 166 and 167 of the Revenue Act of 1938 and the Internal Revenue Code, rather than in the trust itself.



5. In holding that Sections 22(a), 166, and 167 of the Revenue Act of 1938 and the Internal Revenue Code are inapplicable.

6. In denying the Commissioner's motion to reconsider and set aside the Court's findings of fact and opinion.

7. In that its opinion and decision are contrary to the facts as stipulated by the parties.

8. In that its opinion and its decision are contrary to law and the Commissioner's regulations.

/s/ THERON L. CAUDLE,  
Assistant Attorney General.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

Statement of Service attached.

Received and filed May 4, 1950, T.C.U.S.

The Tax Court of the United States

Docket No. 3039

CONSTANCE CHANDLER CROWE,

Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

### PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:PB) dated June 30, 1943, and as a basis of this proceeding alleges as follows:

#### I.

Petitioner is an individual residing at 1150 South Arroyo Drive, Pasadena, California. Returns for the period here involved were filed with the Collector for the Sixth District of California.

#### II.

The notice of deficiency, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof, was mailed to the petitioner on June 30, 1943.

#### III.

The taxes in controversy are income taxes for the

calendar years 1938 to 1941, inclusive, totaling \$9496.92.

#### IV.

The determination of the taxes set forth in said notice of deficiency is based upon the following errors:

(1) Respondent erred in determining deficiencies in income tax for the years 1938 to 1941, inclusive, in the total sum of \$9496.92.

(2) Respondent erred in adding to petitioner's net taxable income for the year 1938 the sum of \$3327.88.

(3) Respondent erred in adding to petitioner's net taxable income for the year 1938 the sum of \$7209.79, representing partnership income belonging to petitioner's husband, Earl E. Crowe.

(4) Respondent erred in adding to petitioner's net taxable income for the year 1939 the sum of \$4028.18.

(5) Respondent erred in adding to petitioner's net taxable income for the year 1939 the sum of \$4200.25, representing partnership income belonging to petitioner's husband, Earl E. Crowe.

(6) Respondent erred in increasing petitioner's net taxable income for the year 1940 by the sum of \$4027.73.

(7) Respondent erred in adding to petitioner's net taxable income for the year 1940 the sum of

\$3124.19, representing partnership income belonging to petitioner's husband, Earl E. Crowe.

(8) Respondent erred in increasing petitioner's net taxable income for the year 1941 by the sum of \$2036.16.

(9) Respondent erred in adding to petitioner's net taxable income for the year 1941 the sum of \$1419.36, representing partnership income belonging to petitioner's husband, Earl E. Crowe.

## V.

The facts upon which petitioner relies as the basis of this proceeding are as follows:

(1) Petitioner is a resident of the County of Los Angeles, State of California, and as such filed her income tax returns for each of the years herein involved with the Collector of Internal Revenue for the Sixth Collection District of California.

(2) Petitioner during the years herein involved was a beneficiary under that certain trust designated Trust No. 2, wherein Marian Otis Chandler, May C. Goodan, Constance Chandler (Constance Chandler Crowe), Ruth C. Williamson, Norman Chandler, Harrison G. O. Chandler, Helen C. Garland, and Philip Chandler are designated "present trustees."

(3) Petitioner, as beneficiary, during the year 1938 received as her full and complete share of the distributive net income of said Trust No. 2 the sum

of \$8118.58, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1938 was the sum of \$11,446.46, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$3327.88. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(4) Petitioner's husband, Earl E. Crowe, was during the year 1938 a member of the partnership of Dobbs, Crowe and Company. Petitioner is informed and believes and therefore alleges that Earl E. Crowe's distributive share of the partnership profits for the year 1938 was the sum of \$18,024.46 and that only 20% thereof, or \$3604.89, represented community earnings. Notwithstanding this fact, respondent erroneously and illegally determined that the entire distributive share of said partnership earnings belonging to Earl E. Crowe was community earnings, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$7209.79.

(5) Petitioner, as beneficiary, during the year 1939 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$8389.89, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for

the year 1939 was the sum of \$12,418.07, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$4028.18. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(6) Petitioner's husband, Earl E. Crowe, was during the year 1939 a member of the said partnership of Dobbs, Crowe and Company. Petitioner is informed and believes and therefore alleges that Earl E. Crowe's distributive share of the partnership profits for the year 1939 was the sum of \$10,500.62 and that only 20% thereof, or \$2100.12, represented community earnings. Notwithstanding this fact, respondent erroneously and illegally determined that the entire distributive share of said partnership earnings belonging to Earl E. Crowe was community earnings, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$4200.25.

(7) Petitioner, as beneficiary, during the year 1940 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$9385.93, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1940 was the sum of \$13,413.66, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$4027.73. No part of this last mentioned sum was either actually or con-

structively received by petitioner and no part thereof constituted taxable income.

(8) Petitioner's husband, Earl E. Crowe, was during the year 1940 a member of the said partnership of Dobbs, Crowe and Company. Petitioner is informed and believes and therefore alleges that Earl E. Crowe's distributive share of the partnership profits for the year 1940 was the sum of \$7810.49 and that only 20% thereof, or \$1562.10, represented community earnings. Notwithstanding this fact, respondent erroneously and illegally determined that the entire distributive share of said partnership earnings belonging to Earl E. Crowe was community earnings, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$3124.19.

(9) Petitioner, as beneficiary, during the year 1941 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$10,527.69, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1941 was the sum of \$12,563.85, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$2036.16. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(10) Petitioner's husband, Earl E. Crowe, was during the year 1941 a member of the said partner-



ship of Dobbs, Crowe and Company. Petitioner is informed and believes and therefore alleges that Earl E. Crowe's distributive share of the partnership profits for the year 1941 was the sum of \$2740.09 and that only 20% thereof, or \$548.02, represented community earnings. Notwithstanding this fact, respondent erroneously and illegally determined that the entire distributive share of said partnership earnings belonging to Earl E. Crowe was community earnings, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$1419.36.

(11) Respondent, under date of June 30, 1943, issued a notice of deficiency determining that said Trust No. 2 was an association taxable as a corporation. Under date of June 30, 1943, respondent issued a notice of deficiency determining that Trust No. 1, wherein Harry Chandler, Norman Chandler, and Marian Otis Chandler are designated "present trustees," and petitioner and others are designated "beneficiaries," was an association taxable as a corporation. Petitioner is informed and believes and therefore alleges that the trustees of each of the aforementioned trusts have filed or will file a petition to The United States Tax Court for a redetermination of the deficiencies set forth in said notices; and that the actions of the respondent in determining said trusts to be associations taxable as corporations and in determining the deficiencies herein involved are inconsistent, erroneous, and illegal.

Wherefore, petitioner prays that The Tax Court

of the United States hear this petition and redetermine the aforesaid deficiencies in accordance with the rights of the petitioner in the premises and grant any and all refunds that may be due as a result of such redetermination.

Dated September 20, 1943.

/s/ A. CALDER MACKAY

/s/ ARTHUR McGREGOR

/s/ HOWARD W. REYNOLDS

Counsel for Petitioner.

State of California

County of Los Angeles—ss.

Constance Chandler Crowe, being duly sworn, deposes and says that she is the petitioner above named; that she has read the foregoing petition, or had the same read to her, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those she believes to be true.

/s/ CONSTANCE CHANDLER  
CROWE.

Subscribed and sworn to before me this 23d day of September, 1943.

[Seal]      /s/ MARY E. WHITTHORNE,  
Notary Public in and for said  
County and State.

My Commission Expires November 26, 1945.

EXHIBIT A

Form 1279

Treasury Department

Internal Revenue Service  
417 South Hill Street  
Los Angeles 13, California

June 30, 1943

Office of  
Internal Revenue Agent in Charge  
Los Angeles Division  
LA:IT:90D:PB

Mrs. Constance Chandler Crowe,  
1150 South Arroyo Drive,  
Pasadena, California.

Madam:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1938 to 1941, inclusive, discloses a deficiency of \$9,496.92 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may

file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,  
Commissioner,

By GEORGE D. MARTIN,  
Internal Revenue Agent in  
Charge.

Enclosures:

Statement

Form of waiver.

Statement

LA:IT:90D:PB

Mrs. Constance Chandler Crowe,  
1150 South Arroyo Drive,  
Pasadena, California.

Tax Liability for the Taxable Years Ended

December 31, 1938, to 1941, Inclusive

Income Tax

Year	Liability	Assessed	Deficiency
1938.....	\$ 5,779.69	\$ 3,323.03	\$2,456.66
1939.....	6,845.67	4,778.92	2,066.75
1940.....	12,016.33	8,909.44	3,106.89
1941.....	14,362.71	12,496.09	1,866.62
Total .....	\$39,004.40	\$29,507.48	\$9,496.92

This determination of your income tax liability has been made upon the basis of information on file in this office.

A copy of this letter and statement has been mailed to your representative, Mr. J. H. Pulliam, Pacific Mutual Building, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Net Income

Taxable Year Ended December 31, 1938

Net income as disclosed by return .....\$29,214.06

Additional income:

(a) Interest received .....	\$ 68.06	
(b) Partnership income .....	7,209.79	
(c) Trust income .....	3,003.67	10,281.52

Net income adjusted .....\$39,495.58

Explanation of Adjustments

(a) You failed to report interest received on Illinois Commercial Telephone Company bond in the amount of \$68.06.

(b) Your community share of your husband's distributive share of income of the partnership Dobbs, Crowe and Company has been determined as \$9,012.23, in lieu of \$1,802.44 reported in your return, an increase of \$7,209.79. One-half, instead of one-tenth, of your husband's distributive share is taxable to you.

(c) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1".....	\$17,951.65	\$17,627.44	\$(324.21)
"Chandler Trust No. 2".....	8,118.58	11,446.46	3,327.88
Total .....	\$26,070.23	\$29,073.90	\$3,003.67

### Computation of Tax

Taxable Year Ended December 31, 1938

Net income adjusted .....	\$39,495.58
Less: Personal exemption .....	\$ 2,500.00
Credit for dependent .....	400.00
Balance (surtax net income) .....	\$36,595.58
Less: Earned income credit .....	300.00
Net income subject to normal tax.....	\$36,295.58
Normal tax at 4% on \$36,295.58 .....	\$ 1,451.82
Surtax on \$36,595.58 .....	4,345.07
Total income tax .....	\$ 5,796.89
Less: Income tax paid at source .....	17.20
Correct income tax liability .....	\$ 5,779.69
Income tax assessed:	
Original, account No. 206297 .....	3,323.03
Deficiency of income tax .....	\$ 2,456.66

### Adjustments to Net Income

Taxable Year Ended December 31, 1939

Net income as disclosed by return .....	\$35,466.10
Additional income:	
(a) Interest received .....	\$ 76.44
(b) Partnership income .....	4,200.25
(c) Trust income .....	3,686.75
Net income adjusted .....	\$43,429.54

Explanation of Adjustments

(a) Interest on savings accounts was received in the amount of \$534.71, in lieu of \$458.27 reported in your return.

(b) Your community share of your husband's distributive share of income of the partnership Dobbs, Crowe and Company has been determined as \$5,250.31, in lieu of \$1,050.06 reported in your return, an increase of \$4,200.25. One-half, instead of one-tenth, of your husband's distributive share is taxable to you.

(c) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount reported in your return	Amount determined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1".....	\$21,560.46	\$21,219.03	\$(341.43)
"Chandler Trust No. 2".....	8,389.89	12,418.07	4,028.18
Total .....	<u>\$29,950.35</u>	<u>\$33,637.10</u>	<u>\$3,686.75</u>

Computation of Tax

Taxable Year Ended December 31, 1939

Net income adjusted .....	\$43,429.54
Less: Personal exemption .....	\$ 2,500.00
Credit for dependent .....	400.00
Balance (surtax net income) .....	<u>\$40,529.54</u>
Less: Earned income credit .....	300.00
Net income subject to normal tax .....	<u>\$40,229.54</u>
Normal tax at 4% on \$40,229.54 .....	\$ 1,609.18
Surtax on \$40,529.54 .....	<u>5,247.09</u>
Total income tax .....	\$ 6,856.27
Less: Income tax paid at source .....	10.60
Correct income tax liability .....	<u>\$ 6,845.67</u>
Income tax assessed:	
Original, account No. 202524 .....	<u>4,778.92</u>
Deficiency of income tax .....	<u>\$ 2,066.75</u>



## Adjustments to Net Income

Taxable Year Ended December 31, 1940

Net income as disclosed by return .....\$38,530.91

## Additional income:

(a) Dividends received .....	\$ 225.00	
(b) Interest received .....	63.66	
(c) Partnership income .....	3,124.19	
(d) Trust income .....	3,690.41	7,103.26

Net income adjusted .....\$45,634.17

## Explanation of Adjustments

(a) You failed to report dividends received from Arden Farms Company in the amount of \$225.00.

(b) The following interest received on bonds was not reported in your return:

Utah Power and Light Co. ....	\$13.33
Libby, McNeil and Libby .....	50.33

Total .....	\$63.66
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(c) Your community share of your husband's distributive share of income of the partnership Dobbs, Crowe and Company has been determined as \$3,905.24, in lieu of \$781.05 reported in your return, an increase of \$3,124.19. One-half, instead of one-tenth, of your husband's distributive share is taxable to you.

(d) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1" .....	\$23,314.74	\$22,977.42	\$(337.32)
"Chandler Trust No. 2" .....	9,385.93	13,413.66	4,027.73
Total .....	\$32,700.67	\$36,391.08	\$3,690.41

## Computation of Alternative Tax

Taxable Year Ended December 31, 1940

Net income adjusted .....	\$45,634.17	
Plus: Net long-term capital loss .....	997.79	
Ordinary net income .....	\$46,631.96	
Less: Personal exemption .....	\$ 2,000.00	
Credit for dependent .....	400.00	2,400.00
Balance (surtax net income) .....	\$44,231.96	
Less: Earned income credit .....	300.00	
Net income subject to normal tax .....	\$43,931.96	
Normal tax at 4% on \$43,931.96 .....	\$ 1,757.28	
Surtax on \$44,231.96 .....	9,472.78	
Partial tax .....	\$11,230.06	
Minus: 30% of net long-term capital loss .....	299.33	
Alternative tax .....	\$10,930.73	

## Computation of Tax

Taxable Year Ended December 31, 1940

Net income adjusted .....	\$45,634.17	
Less: Personal exemption .....	\$ 2,000.00	
Credit for dependent .....	400.00	2,400.00
Balance (surtax net income) .....	\$43,234.17	
Less: Earned income credit .....	300.00	
Net income subject to normal tax .....	\$42,934.17	
Normal tax at 4% on \$42,934.17 .....	\$ 1,717.36	
Surtax on \$43,234.17 .....	9,104.30	
Total .....	\$10,821.66	
Alternative tax .....	\$10,930.73	
Defense tax (10% of \$10,930.73) .....	1,093.07	
Total income tax .....	\$12,023.80	
Less: Income tax paid at source .....	7.47	
Correct income tax liability .....	\$12,016.33	
Income tax assessed:		
Original, account No. 204872 .....	8,909.44	
Deficiency of income tax .....	\$ 3,106.89	

## Adjustments to Net Income

Taxable Year Ended December 31, 1941

Net income as disclosed by return .....	\$33,205.58	
Additional income:		
(a) Partnership income .....	\$ 1,419.36	
(b) Trust income .....	1,702.24	3,121.60
Net income adjusted .....		\$36,327.18

## Explanation of Adjustments

(a) Your husband's distributive share of income of the partnership Dobbs, Crowe and Company has been increased \$646.65 from \$2,740.09 to \$3,386.74. Your community share of said amount of \$3,386.74 has been determined as \$1,693.37, and since you reported \$274.01 income from this source in your return, an addition of \$1,419.36 is made. One-half, instead of one-tenth, of your husband's distributive share is taxable to you.

The determined amount of \$1,693.37 consists of:

Ordinary income .....	\$1,814.76
Net short-term capital gain .....	201.94
Net long-term capital loss .....	(323.33)
Total .....	\$1,693.37

(b) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1" .....	\$23,311.10	\$22,977.18	\$(333.92)
"Chandler Trust No. 2" .....	10,527.69	12,563.85	2,036.16
Total .....	\$33,838.79	\$35,541.03	\$1,702.24

## Computation of Alternative Tax

Taxable Year Ended December 31, 1941

Net income adjusted .....	\$36,327.18	
Plus: Net long-term capital loss .....	7,394.35	
Ordinary net income .....		\$43,721.53
Less: Personal exemption .....	\$ 1,500.00	
Credit for dependent .....	400.00	1,900.00
Balance (surtax net income) .....		\$41,821.53
Less: Earned income credit .....		300.00
Net income subject to normal tax .....		\$41,521.53
Normal tax at 4% on \$41,521.53 .....	\$ 1,660.86	
Surtax on \$41,821.53 .....	14,925.41	
Partial tax .....		\$16,586.27
Minus: 30% of net long-term capital loss .....		2,218.30
Alternative tax .....		\$14,367.97

## Computation of Tax

Taxable Year Ended December 31, 1941

Net income adjusted .....	\$36,327.18	
Less: Personal exemption .....	\$ 1,500.00	
Credit for dependent .....	400.00	1,900.00
Balance (surtax net income) .....		\$34,427.18
Less: Earned income credit .....		300.00
Net income subject to normal tax .....		\$34,127.18
Normal tax at 4% on \$34,127.18 .....	\$ 1,365.08	
Surtax on \$34,427.18 .....	11,113.59	
Total .....		\$12,478.67
Alternative tax .....		\$14,367.97
Total income tax .....		\$14,367.97
Less: Income tax paid at source .....		5.26
Correct income tax liability .....		\$14,362.71
Income tax assessed:		
Original, account No. 312274 .....		12,496.09
Deficiency of income tax .....		\$ 1,866.62

Received and filed Sept. 27, 1943, T.C.U.S.

[Title of Tax Court and Cause.]

Docket No. 3039

## ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

### I. and II.

Admits the allegations contained in paragraphs I and II of the petition.

### III.

Admits that the taxes in controversy are income taxes for the calendar years 1938 to 1941, inclusive, but denies that the total of the proposed deficiencies, aggregating \$9,496.92, is in controversy.

### IV.

(1) to (9), inclusive. Denies the allegations contained in subparagraphs (1) to (9), inclusive, of paragraph IV of the petition.

### V.

(1) and (2) Admits the allegations contained in subparagraphs (1) and (2), of paragraph V of the petition.

(3) Admits that the petitioner, in her income tax

return for 1938, reported \$8,118.58 as income from Trust No. 2. Admits that respondent determined that the income reportable by petitioner from said source was \$11,446.46, and accordingly increased net taxable income reported by petitioner by \$3,327.88. Denies that respondent's determination is erroneous, and denies the remaining allegations contained in subparagraph (3) of paragraph V of the petition.

(4) Admits that petitioner's husband was, during the year 1938, a member of the partnership of Dobbs, Crowe and Company. Admits that respondent added to petitioner's net taxable income the sum of \$7,209.79 by reason of increasing the amount reported as her share of her husband's distributive share of income of said partnership. Denies that said increase was erroneous and illegal and denies the remaining allegations in subparagraph (4) of paragraph V of the petition.

(5) Admits that the petitioner, in her income tax return for 1939, reported \$8,389.89 as income from Trust No. 2. Admits that respondent determined that the income reportable by petitioner from said source was \$12,418.07, and accordingly increased net taxable income reported by petitioner by \$4,028.18. Denies that respondent's determination is erroneous, and denies the remaining allegations contained in subparagraph (5) of paragraph V of the petition.

(6) Admits that petitioner's husband was, during the year 1939, a member of the partnership of

Dobbs, Crowe and Company. Admits that respondent added to petitioner's net taxable income the sum of \$4,200.25 by reason of increasing the amount reported as her share of her husband's distributive share of income of said partnership. Denies that said increase was erroneous and illegal and denies the remaining allegations contained in subparagraph (6) of paragraph V of the petition.

(7) Admits that the petitioner, in her income tax return for 1940, reported \$9,385.93 as income from Trust No. 2. Admits that respondent determined that the income reportable by petitioner from said source was \$13,413.66, and accordingly increased net taxable income reported by petitioner by \$4,027.73. Denies that respondent's determination is erroneous, and denies the remaining allegations contained in subparagraph (7) of paragraph V of the petition.

(8) Admits that petitioner's husband was, during the year 1940, a member of the partnership of Dobbs, Crowe and Company. Admits that respondent added to petitioner's net taxable income the sum of \$3,124.19 by reason of increasing the amount reported as her share of her husband's distributive share of income of said partnership. Denies that said increase was erroneous and illegal and denies the remaining allegations contained in subparagraph (8) of paragraph V of the petition.

(9) Admits that the petitioner, in her income tax return for 1941, reported \$10,527.69 as income from



Trust No. 2. Admits that respondent determined that the income reportable by petitioner from said source was \$12,563.85, and accordingly increased net taxable income reported by petitioner by \$2,036.16. Denies that respondent's determination is erroneous, and denies the remaining allegations contained in subparagraph (9) of paragraph V of the petition.

(10) Admits that petitioner's husband was, during the year 1941, a member of the partnership of Dobbs, Crowe and Company. Admits that respondent added to petitioner's net taxable income the sum of \$1,419.36 by reason of increasing the amount reported as her share of her husband's distributive share of income of said partnership. Denies that said increase was erroneous and illegal and denies the remaining allegations contained in subparagraph (10) of paragraph V of the petition.

(11) Denies the allegations contained in subparagraph (11) of paragraph V of the petition.

## VI

Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,  
Division Counsel.

HAROLD D. THOMAS,  
Special Attorney,  
Bureau of Internal Revenue.

Received and filed Nov. 17, 1943 T.C.U.S.

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The Tax Court of the United States, Washington  
Docket No. 3039

CONSTANCE CHANDLER CROWE,  
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DECISION

Pursuant to the Opinion of this Court, promulgated May 23, 1949, it is

Ordered and decided: That there are deficiencies in income tax for the calendar years 1938, 1939, 1940 and 1941, in the respective amounts of \$1,577.88, \$938.28, \$1,286.73, and \$700.51.

[Seal]      /s/ WILLIAM W. ARNOLD,  
Judge.

Entered May 24, 1949.

Served May 25, 1949.

In the United States Court of Appeals for the  
Ninth Circuit

T. C. Docket No. 3039

COMMISSIONER OF INTERNAL REVENUE,  
Petitioner on Review.

vs.

CONSTANCE CHANDLER CROWE,  
Respondent on Review.

PETITION FOR REVIEW

To the Honorable Judges of the United States Court  
of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on November 30, 1949, "That there are deficiencies in income tax for the calendar years 1938, 1939, 1940 and 1941 in the respective amounts of \$1,577.88; \$938.28; \$1,286.73, and \$700.51" in respect of the Federal income tax liability of Constance Chandler Crowe, the above-named respondent on review. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The respondent on review, Constance Chandler Crowe, is a resident of Pasadena, California, and filed her Federal income tax returns for the years 1938, 1939, 1940 and 1941 with the Collector of Internal Revenue for the Sixth District of California, whose office is in Los Angeles, California, and with-

in the jurisdiction of the United States Court of Appeals for the Ninth Circuit wherein this review is sought.

### Nature of Controversy

The issue presented to and passed upon by The Tax Court of the United States and which was decided contrary to the Commissioner's determination is whether certain taxable stock dividends which were received by Chandler Trust No. 2, of which trust the respondent on review was one of the life tenant trustors, are taxable to the life tenant trustors of the trust, as determined by the Commissioner, or, as claimed by the taxpayer, to the trust itself. The Tax Court held, contrary to the Commissioner's determination, that Sections 22(a), 166, and 167 of the Revenue Act of 1938 and the Internal Revenue Code are inapplicable and that the stock dividends in question are taxable to the trust rather than to the life tenant beneficiaries and trustors. The Commissioner's determination in this and related cases was thus disapproved in so far as it reflected the Commissioner's inclusion of an allocate portion of the taxable stock dividends in the taxable income of each of the life tenant trustors for the years here involved.

/s/ THERON L. CAUDLE,  
Assistant Attorney General.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue, Attorneys for the Petitioner on Review.

Received and filed Feb. 17, 1950 U.S.C.A.

[Title of Court of Appeals and Cause.]

T. C. Docket No. 3039

## STATEMENT OF POINTS

Comes now the Commissioner of Internal Revenue, petitioner on review in the above-entitled cause, by and through his attorneys, Theron L. Caudle, Assistant Attorney General, and Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and hereby states that he intends to rely upon the following points in this proceeding:

The Tax Court of the United States erred:

1. In ordering and deciding that there are deficiencies in income tax for the calendar years 1938, 1939, 1940 and 1941 in the respective amounts of \$1,577.88, \$938.28, \$1,286.73, and \$700.51.

2. In failing and refusing to sustain the deficiencies in tax determined by the Commissioner, as modified by the stipulation of the parties, on the basis that the stock dividends received by the Chandler Trust No. 2 were taxable to the life tenant trustors.

3. In holding that the Chandler Trust No. 2 was, for Federal income tax purposes, a valid trust under the laws of California.

4. In failing and refusing to hold and decide that the Chandler Trust No. 2 was, by virtue of the rights of amendment or modification reserved by the

trustors, not a valid trust for Federal income tax purposes and that, accordingly, the taxable stock dividends received by the trust during the taxable years were taxable to the life tenant trustors under Sections 22(a) and/or Sections 166 and 167 of the Revenue Act of 1938 and the Internal Revenue Code, rather than to the trust itself.

5. In holding that Sections 22(a), 166, and 167 of the Revenue Act of 1938 and the Internal Revenue Code are inapplicable.

6. In denying the Commissioner's motion to reconsider and set aside the Court's findings of fact and opinion.

7. In that its opinion and decision are contrary to the facts as stipulated by the parties.

8. In that its opinion and its decision are contrary to law and the Commissioner's regulations.

/s/ THERON L. CAUDLE,  
Assistant Attorney General.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

Statement of service attached.

Received and filed May 4, 1950 U.S.C.A.

The Tax Court of the United States

Docket No. 3040

HELEN CHANDLER GARLAND,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:PB) dated June 30, 1943, and as a basis of this proceeding alleges as follows:

I.

Petitioner is an individual residing at 1999 Oak Knoll Avenue, San Marino, California. The returns for the period here involved were filed with the Collector for the Sixth District of California.

II.

The notice of deficiency, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof, was mailed to the petitioner on June 30, 1943.

III.

The taxes in controversy are income taxes for the



calendar years 1938 to 1941, inclusive, totaling \$5186.62.

#### IV.

The determination of the taxes set forth in said notice of deficiency is based upon the following errors:

(1) Respondent erred in determining deficiencies in income tax for the years 1938 to 1941, inclusive, in the total sum of \$5186.62.

(2) Respondent erred in adding to petitioner's net taxable income for the year 1938 the sum of \$5299.74.

(3) Respondent erred in adding to petitioner's net taxable income for the year 1939 the sum of \$4188.00.

(4) Respondent erred in adding to petitioner's net taxable income for the year 1940 the sum of \$5195.60.

(5) Respondent erred in adding to petitioner's net taxable income for the year 1941 the sum of \$1727.23.

#### V.

The facts upon which petitioner relies as the basis of this proceeding are as follows:

(1) Petitioner is a resident of the County of Los Angeles, State of California, and as such filed her income tax returns for each of the years herein involved with the Collector of Internal Revenue for the Sixth Collection District of California.

(2) Petitioner during the years herein involved was a beneficiary under that certain trust designated Trust No. 2, wherein Marian Otis Chandler, May C. Goodan, Constance Chandler (Constance Chandler Crowe), Ruth C. Williamson, Norman Chandler, Harrison G. O. Chandler, Helen C. Garland, and Philip Chandler are designated "present trustees."

(3) Petitioner, as beneficiary, during the year 1938 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$8118.59, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1938 was the sum of \$11,446.46, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$3327.87. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(4) Petitioner, as beneficiary, during the year 1939 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$8389.89, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1939 was the sum of \$12,418.07, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$4028.18. No part of

this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(5) Petitioner, as beneficiary, during the year 1940 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$9385.93, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1940 was the sum of \$13,413.67, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$4027.74. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(6) Petitioner, as beneficiary, during the year 1941 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$10,527.69, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1941 was the sum of \$12,563.85, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$2036.16. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(7) Respondent, under date of June 30, 1943, issued a notice of deficiency determining that said Trust No. 2 was an association taxable as a cor-

poration. Under date of June 30, 1943, respondent issued a notice of deficiency determining that Trust No. 1, wherein Harry Chandler, Norman Chandler, and Marian Otis Chandler are designated "present trustees" and petitioner and others are designated "beneficiaries", was an association taxable as a corporation. Petitioner is informed and believes and therefore alleges that the trustees of each of the aforementioned trusts have filed or will file a petition to The United States Tax Court for a redetermination of the deficiencies set forth in said notices, and that the actions of the respondent in determining said trusts to be associations taxable as corporations and in determining the deficiencies herein involved are inconsistent, erroneous, and illegal.

Wherefore, petitioner prays that The Tax Court of the United States hear this petition and redetermine the aforesaid deficiencies in accordance with the rights of the petitioner in the premises and grant any and all refunds that may be due as a result of such redetermination.

Dated September 20, 1943.

/s/ A. CALDER MACKAY,

/s/ ARTHUR MCGREGOR,

/s/ HOWARD W. REYNOLDS,

Counsel for Petitioner.

State of California

County of Los Angeles—ss.

Helen Chandler Garland, being duly sworn, deposes and says that she is the petitioner above named; that she has read the foregoing petition, or had the same read to her, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those she believes to be true.

/s/ HELEN CHANDLER GARLAND.

Subscribed and sworn to before me this 23rd day of September, 1943.

[Seal] /s/ MARY E. WHITTHORNE,  
Notary Public in and for said  
County and State.

My Commission Expires November 26, 1945.

EXHIBIT A

Treasury Department  
Internal Revenue Service  
417 South Hill Street  
Los Angeles 13, California

June 30, 1943

Office of  
Internal Revenue Agent in Charge  
Los Angeles Division  
LA:IT:90D:PB

Mrs. Helen Chandler Garland,  
1999 Oak Knoll Avenue,  
San Marino, California

Madam:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1938 to 1941 inclusive discloses a deficiency of \$5,186.62 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C.,

for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA: Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,  
Commissioner,

By /s/ GEORGE D. MARTIN,  
Internal Revenue Agent in Charge.

Enclosures:

Statement

Form of waiver.



## Statement

LA:IT:90D:PB

Mrs. Helen Chandler Garland,  
1999 Oak Knoll Avenue,  
San Marino, California.

Tax Liability for the Taxable Years Ended  
December 31, 1938 to 1941, Inclusive

## Income Tax

Year	Liability	Assessed	Deficiency
1938.....	\$ 3,777.82	\$ 2,639.64	\$1,138.18
1939.....	5,436.87	4,408.19	1,028.68
1940.....	8,818.54	6,734.17	2,084.37
1941.....	13,648.67	12,713.28	935.39
Total.....	<u>\$31,681.90</u>	<u>\$26,495.28</u>	<u>\$5,186.62</u>

This determination of your income tax liability has been made upon the basis of information on file in this office.

## Adjustments to Net Income

## Taxable Year Ended December 31, 1938

Net income as disclosed by return .....	\$26,312.10
Additional income and unallowable deductions:	
(a) Dividends received .....	\$ 130.00
(b) Interest received .....	217.00
(c) Trust income .....	3,003.65
(d) Long-term capital losses .....	1,949.09
Net income adjusted .....	<u>\$31,611.84</u>

## Explanation of Adjustments

(a) Dividends were received from Security-First National Bank in the amount of \$650.00, instead of \$520.00 reported in your return.

(b) Interest received as follows is added to income:

Cities Service Company .....	\$ 46.58
Nevada California Electric Co. ....	18.61
Central Investment Corp. ....	116.25
Mortgage Guarantee Co. ....	35.56

Total .....\$217.00

(c) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1" .....	\$17,951.66	\$17,627.44	\$(324.22)
"Chandler Trust No. 2" .....	8,118.59	11,446.46	3,327.87
Total .....	\$26,070.25	\$29,073.90	\$3,003.65

(d) The following long-term capital losses claimed in your return are disallowed for lack of substantiation of basis of the securities sold:

Central Investment Company .....	\$ 549.96
Mortgage Guarantee Cert. ....	385.80
Nevada California Electric Co. ....	436.49

Total. ....\$1,372.25

In lieu of the long-term capital loss of \$158.41 claimed from the sale of 327 shares of Massachusetts Investors Trust stock for \$6,273.26, there is determined no gain or loss from the sale of 127 of such shares for \$2,436.40 and a long-term capital gain of \$468.43 from the sale of 200 of such shares for \$3,836.86, resulting in an adjustment of \$626.84.

Due to a mathematical error in your return the long-term capital loss claimed from the sale of Southern California Edison company stock is understated \$50.00.

These adjustments result in the addition to income of the net amount of \$1,949.09.

### Computation of Tax

Taxable Year Ended December 31, 1938

Net income adjusted .....	\$31,611.84
Less: Personal exemption .....	\$ 2,500.00
Credit for dependents .....	800.00      3,300.00
Balance (surtax net income) .....	\$28,311.84
Less: Interest on U.S. obligations .....	56.25
Earned income credit .....	300.00      356.25
Net income subject to normal tax .....	\$27,955.59
Normal tax at 4% on \$27,955.59 .....	\$ 1,118.22
Surtax on \$28,311.84 .....	2,679.25
Total income tax .....	\$ 3,797.47
Less: Income tax paid at source .....	19.65
Correct income tax liability .....	\$ 3,777.82
Income tax assessed:	
Original, account No. 834696 .....	\$ 2,613.64
Deficiency, March 1941, account No. 510087....	26.00
Total .....	2,639.64
Deficiency of income tax .....	\$ 1,138.18

Adjustments to Net Income

Taxable Year Ended December 31, 1939

Net income as disclosed by return .....	\$34,384.24
Additional income and unallowable deductions:	
(a) Dividends received .....	\$ 257.50
(b) Trust income .....	3,686.75
(c) Long-term capital loss .....	243.75      4,188.00
Net income adjusted .....	\$38,572.24

Explanation of Adjustments

(a) The following dividends received are added to income reported:

Magma Copper Company .....	\$125.00
National Malleable and Steel Castings Co. ....	100.00
Richfield Oil .....	32.50
Total .....	\$257.50

(b) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1" .....	\$21,560.46	\$21,219.03	\$(341.43)
"Chandler Trust No. 2" .....	8,389.89	12,418.07	4,028.18
Total .....	\$29,950.35	\$33,637.10	\$3,686.75

(c) The long-term capital loss of \$243.75 claimed from the sale of \$5,000.00 Central Investment Corporation bonds is disallowed for lack of substantiation of the basis.

## Computation of Tax

Taxable Year Ended December 31, 1939

Net income adjusted .....		\$38,572.24
Less: Personal exemption .....	\$ 2,500.00	
Credit for dependents .....	800.00	3,300.00
		<hr/>
Balance (surtax net income) .....		\$35,272.24
Less: Interest on U.S. obligations .....	133.13	
Earned income credit .....	300.00	433.13
		<hr/>
Net income subject to normal tax .....		\$34,839.11
Normal tax at 4% on \$34,839.11 .....	\$ 1,393.56	
Surtax on \$35,272.24 .....	4,067.17	
		<hr/>
Total income tax .....		\$ 5,460.73
Less: Income tax paid at source .....		23.86
		<hr/>
Correct income tax liability .....		\$ 5,436.87
Income tax assessed:		
Original, account No. 202572 .....		4,408.19
		<hr/>
Deficiency of income tax .....		\$ 1,028.68

## Adjustments to Net Income

Taxable Year Ended December 31, 1940

Net income as disclosed by return .....		\$33,469.05
Additional income and unallowable deductions:		
(a) Dividends received .....	\$ 34.50	
(b) Trust income .....	3,690.42	
(c) Short-term capital gain .....	811.46	
(d) Taxes disallowed .....	659.22	5,195.60
		<hr/>
Total .....		\$38,664.65
Additional deduction:		
(e) Interest paid .....		74.31
		<hr/>
Net income adjusted .....		\$38,590.34

Explanation of Adjustments

(a) You failed to report dividends of \$34.50 received from Standard Oil Company (New Jersey).

(b) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1".....	\$23,314.74	\$22,977.42	\$(337.32)
"Chandler Trust No. 2".....	9,385.93	13,413.67	4,027.74
Total .....	\$32,700.67	\$36,391.09	\$3,690.42

(c) You failed to report a net short-term capital gain of \$811.46 consisting of the following gains from the sales of capital assets held not more than 18 months:

Stock	Sale price	Cost	Gain
500 shares Northrup Aircraft, Inc.....	\$3,499.80	\$2,727.27	\$772.53
2 shares Massachusetts Investors Trust..	38.93	0.00	38.93
Total .....	\$3,538.73	\$2,727.27	\$811.46

(d) The deduction claimed for taxes on real estate at 2960 Wilshire Boulevard is disallowed to the extent of \$511.43, representing taxes which had become a lien against the property prior to your purchase thereof as your separately owned property on December 20, 1939, held to constitute an additional cost of the property.

The deduction claimed for taxes on real estate at 1999 Oak Knoll Avenue is disallowed to the extent of \$150.33, representing your half of taxes which had become a lien against the property prior to the purchase thereof by you and your husband as joint tenants on December 14, 1939, held to constitute an additional cost of the property.

An additional deduction of \$2.54 is allowed as your half of the taxes on Oak Knoll Avenue property paid in December, 1940.

(e) An additional deduction of \$74.31 is allowed for interest paid.

## Computation of Alternative Tax

Taxable Year Ended December 31, 1940

Net income adjusted .....		\$38,590.34
Plus: Net long-term capital loss .....		1,669.71
Ordinary net income .....		\$40,260.05
Less: Personal exemption .....	\$ 2,000.00	
Credit for dependents .....	800.00	2,800.00
Balance (surtax net income) .....		\$37,460.05
Less: Earned income credit .....		300.00
Net income subject to normal tax .....		\$37,160.05
Normal tax at 4% on \$37,160.05 .....	\$ 1,486.40	
Surtax on \$37,460.05 .....	7,041.82	
Partial tax .....		\$ 8,528.22
Minus: 30% of net long-term capital loss .....		500.91
Alternative tax .....		\$ 8,027.31

## Computation of Tax

Taxable Year Ended December 31, 1940

Net income adjusted .....		\$38,590.34
Less: Personal exemption .....	\$ 2,000.00	
Credit for dependents .....	800.00	2,800.00
Balance (surtax net income) .....		\$35,790.34
Less: Earned income credit .....		300.00
Net income subject to normal tax .....		\$35,490.34
Normal tax at 4% on \$35,490.34 .....	\$ 1,419.61	
Surtax on \$35,790.34 .....	6,490.81	
Total normal tax and surtax .....		\$ 7,910.42
Alternative tax .....		\$ 8,027.31
Defense tax (10% of \$8,027.31) .....		802.73
Total income tax .....		\$ 8,830.04
Less: Income tax paid at source .....		11.50
Correct income tax liability .....		\$ 8,818.54
Income tax assessed:		
Original, account No. 203445 .....		6,734.17
Deficiency of income tax .....		\$ 2,084.37

Adjustments to Net Income

Taxable Year Ended December 31, 1941

Net income as disclosed by return .....	\$37,204.39
Additional income:	
(a) Dividends received .....	\$ 25.00
(b) Trust income .....	1,702.23
	<hr/>
Net income adjusted .....	\$38,931.62

Explanation of Adjustments

(a) You failed to report dividends of \$25.00 received from National Malleable Steel and Casting Company.

(b) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1" .....	\$23,311.10	\$22,977.17	\$(333.93)
"Chandler Trust No. 2" .....	10,527.69	12,563.85	2,036.16
	<hr/>	<hr/>	<hr/>
Total .....	\$33,838.79	\$35,541.02	\$1,702.23

Computation of Tax

Taxable Year Ended December 31, 1941

Net income adjusted .....	\$38,931.62
Less: Personal exemption .....	\$ 1,500.00
Credit for dependents .....	800.00
	<hr/>
Balance (surtax net income) .....	\$36,631.62
Less: Earned income credit .....	300.00
	<hr/>
Net income subject to normal tax .....	\$36,331.62
Normal tax at 4% on \$36,331.62 .....	\$ 1,453.26
Surtax on \$36,631.62 .....	12,215.81
	<hr/>
Total income tax .....	\$13,669.07
Less: Income tax paid at source .....	20.40
	<hr/>
Correct income tax liability .....	\$13,648.67
Income tax assessed:	
Original, account No. 312313 .....	12,713.28
	<hr/>
Deficiency of income tax .....	\$ 935.39

Received and filed Sept. 27, 1943, T.C.U.S.



[Title of Tax Court and Cause.]

Docket No. 3040

### ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

#### I. and II.

Admits the allegations contained in paragraphs I and II of the petition.

#### III.

Admits that the taxes in controversy are income taxes for the calendar years 1938 to 1941, inclusive, but denies that the total of the proposed deficiencies, aggregating \$5,186.62, is in controversy.

#### IV.

(1) to (5), inclusive. Denies that the respondent erred as alleged in subparagraphs (1) to (5), inclusive, of paragraph IV of the petition.

#### V.

(1) and (2) Admits the allegations contained in subparagraphs (1) and (2) of paragraph V of the petition.

(3) Admits that petitioner, in her income tax return for 1938, reported \$8,118.59 as income from Trust No. 2. Admits that respondent determined that the amount reportable from said source was \$11,446.46, and accordingly increased taxable net income reported by petitioner by \$3,327.87. Denies that respondent's determination was erroneous, and denies the remaining allegations contained in subparagraph (3) of paragraph V of the petition.

(4) Admits that petitioner, in her income tax return for 1939, reported \$8,389.89 as income from Trust No. 2. Admits that respondent determined that the amount reportable from said source was \$12,418.07, and accordingly increased taxable net income reported by petitioner by \$4,028.18. Denies that respondent's determination was erroneous, and denies the remaining allegations contained in subparagraph (4) of paragraph V of the petition.

(5) Admits that petitioner, in her income tax return for 1940, reported \$9,385.93 as income from Trust No. 2. Admits that respondent determined that the amount reportable from said source was \$13,413.67, and accordingly increased taxable net income reported by petitioner by \$4,027.74. Denies that respondent's determination was erroneous, and denies the remaining allegations contained in subparagraph (5) of paragraph V of the petition.

(6) Admits that petitioner, in her income tax return for 1941, reported \$10,527.69 as income from Trust No. 2. Admits that respondent determined

that the amount reportable from said source was \$12,563.85, and accordingly increased taxable net income reported by petitioner by \$2,036.16. Denies that respondent's determination was erroneous, and denies the remaining allegations contained in subparagraph (6) of paragraph V of the petition.

(7) Denies the allegations contained in subparagraph (7) of paragraph V of the petition.

## VI.

Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,  
Chief Counsel, Bureau of  
Internal Revenue.

Of Counsel:

B. H. NEBLETT,  
Division Counsel.  
HAROLD D. THOMAS,  
Special Attorney, Bureau of  
Internal Revenue.

Received and filed Nov. 17, 1943 T.C.U.S.

The Tax Court of the United States  
Washington

Docket No. 3040

HELEN CHANDLER GARLAND,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

DECISION

Pursuant to the Opinion of this Court, promulgated May 23, 1949, it is

Ordered and Decided: That there are deficiencies in income tax for the calendar years 1938, 1939, 1940 and 1941 in the respective amounts of \$133.03, \$59.22, \$582.38, and \$16.20.

[Seal]

WILLIAM W. ARNOLD,  
Judge.

Entered May 24, 1949.

Served May 25, 1949.

In the United States Court of Appeals  
for the Ninth Circuit

Docket No. 3040

COMMISSIONER OF INTERNAL REVENUE,  
Petitioner on Review,  
vs.

HELEN CHANDLER GARLAND,  
Respondent on Review.

PETITION FOR REVIEW

To the Honorable Judges of the United States  
Court of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on November 30, 1949, "That there are deficiencies in income tax for the calendar years 1938, 1939, 1940 and 1941 in the respective amounts of \$133.03; \$59.22; \$582.38, and \$16.20" in respect of the Federal income tax liability of Helen Chandler Garland, the above-named respondent on review. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The respondent on review, Helen Chandler Garland, is a resident of San Marino, California, and filed her Federal income tax returns for the years 1938, 1939, 1940 and 1941 with the Collector of Internal Revenue for the Sixth District of California, whose office is in Los Angeles, California, and within

the jurisdiction of the United States Court of Appeals for the Ninth Circuit wherein this review is sought.

### Nature of Controversy

The issue presented to and passed upon by The Tax Court of the United States and which was decided contrary to the Commissioner's determination is whether certain taxable stock dividends which were received by Chandler Trust No. 2, of which trust the respondent on review was one of the life tenant trustors, are taxable to the life tenant trustors of the trust, as determined by the Commissioner, or, as claimed by the taxpayer, to the trust itself. The Tax Court held, contrary to the Commissioner's determination, that Sections 22(a), 166, and 167 of the Revenue Act of 1938 and the Internal Revenue Code are inapplicable and that the stock dividends in question are taxable to the trust rather than to the life tenant beneficiaries and trustors. The Commissioner's determination in this and related cases was thus disapproved in so far as it reflected the Commissioner's inclusion of an allocated portion of the taxable stock dividends in the taxable income of each of the life tenant trustors for the years here involved.

/s/ THERON L. CAUDLE,  
Assistant Attorney General.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue, Attorneys for the Petitioner on Review.

Received and filed Feb. 17, 1950 U.S.C.A.

[Title of Court of Appeals and Cause.]

Docket No. 3040

### STATEMENT OF POINTS

Comes Now the Commissioner of Internal Revenue, petitioner on review in the above-entitled cause, by and through his attorneys, Theron L. Caudle, Assistant Attorney General, and Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and hereby states that he intends to rely upon the following points in this proceeding:

The Tax Court of the United States erred:

1. In ordering and deciding that there are deficiencies in income tax for the calendar years 1938, 1939, 1940 and 1941 in the respective amounts of \$133.03, \$59.22, \$582.38, and \$16.20.

2. In failing and refusing to sustain the deficiencies in tax determined by the Commissioner, as modified by the stipulation of the parties, on the basis that the stock dividends received by the Chandler Trust No. 2 were taxable to the life tenant trustors.

3. In holding that the Chandler Trust No. 2 was, for Federal income tax purposes, a valid trust under the laws of California.

4. In failing and refusing to hold and decide that the Chandler Trust No. 2 was, by virtue of the rights of amendment or modification reserved by the trustors, not a valid trust for Federal income



tax purposes and that, accordingly, the taxable stock dividends received by the trust during the taxable years were taxable to the life tenant trustors under Sections 22(a) and/or Sections 166 and 167 of the Revenue Act of 1938 and the Internal Revenue Code, rather than to the trust itself.

5. In holding that Sections 22(a), 166, and 167 of the Revenue Act of 1938 and the Internal Revenue Code are inapplicable.

6. In denying the Commissioner's motion to reconsider and set aside the Court's findings of fact and opinion.

7. In that its opinion and decision are contrary to the facts as stipulated by the parties.

8. In that its opinion and its decision are contrary to law and the Commissioner's regulations.

/s/ THERON L. CAUDLE,  
Assistant Attorney General.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

Statement of service attached.

Received and filed May 4, 1950 U.S.C.A.

The Tax Court of the United States

Docket No. 3041

RUTH C. WILLIAMSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:PB) dated June 30, 1943, and as a basis of this proceeding alleges as follows:

I.

Petitioner is an individual residing at 1025 Arden Road, Pasadena, California. The returns for the period here involved were filed with the Collector for the Sixth District of California.

II.

The notice of deficiency, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof, was mailed to the petitioner on June 30, 1943.

III.

The taxes in controversy are income taxes for the

calendar years 1938 to 1941, inclusive, totaling \$6,025.33.

#### IV.

The determination of the taxes set forth in said notice of deficiency is based upon the following errors:

(1) Respondent erred in determining deficiencies in income tax for the years 1938 to 1941, inclusive, in the total sum of \$6,025.33.

(2) Respondent erred in adding to petitioner's net taxable income for the year 1938 the sum of \$3,327.87.

(3) Respondent erred in adding to petitioner's net taxable income for the year 1939 the sum of \$4,028.18.

(4) Respondent, in determining petitioner's net taxable income for the year 1939, erred in failing to allow as a deduction the sum of \$2,517.50, representing a loss sustained on stock which became worthless.

(5) Respondent erred in increasing petitioner's net taxable income for the year 1940 by the sum of \$4,027.74.

(6) Respondent erred in increasing petitioner's net taxable income for the year 1941 by the sum of \$2,036.16.

## V.

The facts upon which petitioner relies as the basis of this proceeding are as follows:

(1) Petitioner is a resident of the County of Los Angeles, State of California, and as such filed her income tax returns for each of the years herein involved with the Collector of Internal Revenue for the Sixth Collection District of California.

(2) Petitioner during the years herein involved was a beneficiary under that certain trust designated Trust No. 2, wherein Marian Otis Chandler, May C. Goodan, Constance Chandler (Constance Chandler Crowe), Ruth C. Williamson, Norman Chandler, Harrison G. O. Chandler, Helen C. Garland, and Philip Chandler are designated "present trustees."

(3) Petitioner, as beneficiary, during the year 1938 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$8,118.59, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1938 was the sum of \$11,446.46, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$3,327.87. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(4) Petitioner, as beneficiary, during the year 1939 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$8,389.89, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1939 was the sum of \$12,418.07, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$4,028.18. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(5) Petitioner and her husband, Frederick W. Williamson, during the year 1937 purchased 50 shares of preferred stock and 35 shares of common capital stock of Coronado Fisheries, Inc., for which they paid \$5,035.00. Petitioner is informed and believes and therefore states that during the year 1939 the said stock became worthless; notwithstanding the foregoing, respondent erroneously and illegally failed to allow as a deduction one-half of the purchase price of said stock, or the sum of \$2,517.50.

(6) Petitioner, as beneficiary, during the year 1940 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$9,385.93, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's

distributive share of the net income of said trust for the year 1940 was the sum of \$13,413.67, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$4,027.74. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(7) Petitioner, as beneficiary, during the year 1941 received as her full and complete share of the distributive net income of said Trust No. 2 the sum of \$10,527.69, which she reported in her income tax return. Notwithstanding this fact respondent erroneously and illegally determined that petitioner's distributive share of the net income of said trust for the year 1941 was the sum of \$12,563.85, thereby erroneously and illegally overstating petitioner's net taxable income by the sum of \$2,036.16. No part of this last mentioned sum was either actually or constructively received by petitioner and no part thereof constituted taxable income.

(8) Respondent, under date of June 30, 1943, issued a notice of deficiency determining that said Trust No. 2 was an association taxable as a corporation. Under date of June 30, 1943, respondent issued a notice of deficiency determining that Trust No. 1, wherein Harry Chandler, Norman Chandler, and Marian Otis Chandler are designated "present trustees" and petitioner and others are designated "beneficiaries," was an association taxable as a corporation. Petitioner is informed and believes and

therefore alleges that the trustees of each of the aforementioned trusts have filed or will file a petition to The United States Tax Court for a redetermination of the deficiencies set forth in said notices, and that the actions of the respondent in determining said trusts to be associations taxable as corporations and in determining the deficiencies herein involved are inconsistent, erroneous, and illegal.

Wherefore, petitioner prays that The Tax Court of the United States hear this petition and redetermine the aforesaid deficiencies in accordance with the rights of the petitioner in the premises and grant any and all refunds that may be due as a result of such redetermination.

Dated September 20, 1943.

/s/ A. CALDER MACKAY,

/s/ ARTHUR McGREGOR,

/s/ HOWARD W. REYNOLDS,

Counsel for Petitioner.



State of California,  
County of Los Angeles—ss.

Ruth C. Williamson, being duly sworn, deposes and says that she is the petitioner above named; that she has read the foregoing petition, or had the same read to her, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those she believes to be true.

/s/ RUTH C. WILLIAMSON.

Subscribed and sworn to before me this 23rd day of September, 1943.

[Seal]     /s/ MARY E. WHITTHORNE,  
Notary Public in and for said County and State.

My Commission expires November 26, 1945.

EXHIBIT A

Form 1279

Treasury Department  
Internal Revenue Service  
417 South Hill Street  
Los Angeles 13, California

June 30, 1943

Office of Internal Revenue Agent in Charge  
Los Angeles Division

LA:IT:90D:PB

Mrs. Ruth C. Williamson,  
1025 Arden Road,  
Pasadena, California.

Madam:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1938 to 1941, inclusive, discloses a deficiency of \$6,025.33, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington, D. C.,

for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,  
Commissioner.

By /s/ GEORGE D. MARTIN,  
Internal Revenue Agent in  
Charge.

PB:ft

Enclosures:

Statement

Form of Waiver.

Statement

LA:IT:90D:PB

Mrs. Ruth C. Williamson,  
1025 Arden Road,  
Pasadena, California.

Tax Liability for the Taxable Years Ended  
December 31, 1938, to 1941, Inclusive

Income Tax

Year	Liability	Assessed	Deficiency
1938.....	\$ 7,357.64	\$ 6,419.97	\$ 937.67
1939.....	8,845.60	6,186.68	2,658.92
1940.....	15,453.78	13,716.28	1,737.50
1941.....	34,893.18	34,201.94	691.24
Total.....	<u>\$66,550.20</u>	<u>\$60,524.87</u>	<u>\$6,025.33</u>

This determination of your income tax liability has been made upon the basis of information on file in this office.

If you do not acquiesce in all of the adjustments making up the deficiency indicated, but desire to stop the accumulation of interest on that part of the deficiency resulting from adjustments to which you agree, please fill out the enclosed form of waiver, inserting therein the amount of the deficiency you desire to have assessed at once. The execution of the form for the agreed portion of the deficiency will not deprive you of your right to petition The Tax Court of the United States for a re-determination of the deficiency.

A copy of this letter and statement has been mailed to your representative, Mr. A. Calder Mackay, 523 West Sixth Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Net Income

Taxable Year Ended December 31, 1938

Net income as disclosed by return .....	\$43,253.21
Additional income:	
(a) Dividends received .....	\$ 147.52
(b) Trust income .....	3,003.66
(c) Rents received .....	381.45
	<u>3,532.63</u>
Total .....	<u>\$46,785.84</u>
Additional deductions:	
(d) Taxes .....	183.82
	<u>183.82</u>
Net income adjusted .....	<u>\$46,602.02</u>

## Explanation of Adjustments

(a) You failed to include in dividends \$75.00 received on Texas Gulf Sulphur Company stock and \$75.62 on Safeway Stores common stock, a total of \$150.62, and you overstated the amount of dividends from Honolulu Oil Company in the amount of \$3.10, a net understatement of \$147.52.

(b) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1".....	\$17,951.66	\$17,627.45	(\$324.21)
"Chandler Trust No. 2".....	8,118.59	11,446.46	3,327.87
Total .....	\$26,070.25	\$29,073.91	\$3,003.66

(c) Three-fourths, instead of one-half, of the \$1,525.82 net rental from Wilshire Boulevard property is taxable to you.

(d) Three-fourths, instead of one-half, of the \$735.27 taxes on Wilshire Boulevard property is deductible by you.

## Computation of Tax

Taxable Year Ended December 31, 1938

Net income adjusted .....	\$46,602.02
Less: Personal exemption .....	\$ 2,500.00
Credit for dependents .....	1,600.00    4,100.00
Balance (surtax net income) .....	\$42,502.02
Less: Earned income credit .....	1,398.04
Net income subject to normal tax .....	\$41,103.98
Normal tax at 4% on \$41,103.98 .....	\$ 1,644.16
Surtax on \$42,502.02 .....	5,720.48
Total income tax .....	\$ 7,364.64
Less: Income tax paid at source .....	7.00
Correct income tax liability .....	\$ 7,357.64
Income tax assessed:	
Original, account No. 206729 .....	6,419.97
Deficiency of income tax .....	\$ 937.67

Adjustments to Net Income

Taxable Year Ended December 31, 1939

Net income as disclosed by return .....	\$12,420.32
Additional income and unallowable deductions:	
(a) Dividends received .....	\$ 125.00
(b) Interest received .....	333.33
(c) Trust income .....	3,686.75
(d) Rents received .....	481.68
(e) Long-term capital gain .....	3,144.00
(f) Bad debts disallowed .....	1,640.16
	9,410.92
Total .....	\$51,831.24
Additional deduction:	
(g) Taxes .....	268.77
Net income adjusted .....	\$51,562.47

Explanation of Adjustments

(a) You failed to include in dividends \$25.00 received on Texas Gulf Sulphur Company stock and \$139.75 on Safeway Stores common stock, a total of \$164.75, and you overstated the amount of dividend from Honolulu Oil Company in the amount of \$39.75, a net understatement of \$125.00.

(b) Interest received on Los Angeles Traction Company bonds has been determined in the amount of \$500.00, in lieu of \$166.67 reported in your return.

(c) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1" .....	\$21,560.46	\$21,219.03	(\$341.43)
"Chandler Trust No. 2" .....	8,389.89	12,418.07	4,028.18
Total .....	\$29,950.35	\$33,637.10	\$3,686.75

(d) Three-fourths, instead of one-half, of the \$1,926.74 net rental from Wilshire Boulevard property is taxable to you.

(e) The long-term capital loss of \$1,205.06 claimed from the sale of 400 shares of Signal Oil & Gas Company stock is adjusted to a long-term capital gain of \$1,938.94 due to a decrease of \$6,288.00 in the basis of the stock sold.

(f) The deduction claimed for bad debts includes an amount of \$1,640.16 which is not an allowable deduction under section 23(k) of the Internal Revenue Code.

(g) Three-fourths, instead of one-half, of the \$760.15 taxes on Wilshire Boulevard property is deductible by you, and the entire amount, instead of one-half, of the \$157.46 taxes on Ambrose Street property is deductible by you.

## Computation of Alternative Tax

Taxable Year Ended December 31, 1939

Net income adjusted .....		\$51,562.47
Minus: Net long-term capital gain .....		2,038.92
Ordinary net income .....		<u>\$49,523.55</u>
Less: Personal exemption .....	\$ 2,500.00	
Credit for dependents .....	1,600.00	4,100.00
Balance (surtax net income) .....		<u>\$45,423.55</u>
Less: Earned income credit .....		1,009.45
Net income subject to normal tax .....		<u>\$44,414.10</u>
Normal tax at 4% on \$44,414.10 .....	\$ 1,776.56	
Surtax on \$45,423.55 .....	6,464.36	
Partial tax .....		<u>\$ 8,240.92</u>
Plus: 30% of net long-term capital gain .....		611.68
Alternative tax .....		<u>\$ 8,852.60</u>

## Computation of Tax

Taxable Year Ended December 31, 1939

Net income adjusted .....		\$51,562.47
Less: Personal exemption .....	\$ 2,500.00	
Credit for dependents .....	1,600.00	4,100.00
Balance (surtax net income) .....		<u>\$47,462.47</u>
Less: Earned income credit .....		1,009.45
Net income subject to normal tax .....		<u>\$46,453.02</u>
Normal tax at 4% on \$46,453.02 .....	\$ 1,858.12	
Surtax on \$47,462.47 .....	7,014.87	
Total .....		<u>\$ 8,872.99</u>
Alternative tax .....		\$ 8,852.60
Total income tax .....		<u>\$ 8,852.60</u>
Less: Income tax paid at source .....		7.00
Correct income tax liability .....		<u>\$ 8,845.60</u>
Income tax assessed:		
Original, account No. 203568 .....		6,186.68
Deficiency of income tax .....		<u>\$ 2,658.92</u>



## Adjustments to Net Income

Taxable Year Ended December 31, 1940

Net income as disclosed by return .....	\$51,335.90	
Additional income:		
(a) Dividends .....	\$ 62.50	
(b) Trust income .....	3,690.42	3,752.92
Total .....		\$55,088.82
Additional deduction:		
(c) Taxes .....		163.03
Net income adjusted .....		\$54,925.79

## Explanation of Adjustments

(a) Three-fourths, instead of one-half, of \$250.00 dividends received from Texas Gulf Sulphur Company is taxable to you.

(b) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount reported in your return	Amount determined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1" .....	\$23,314.74	\$22,977.42	(\$337.32)
"Chandler Trust No. 2" .....	9,385.93	13,413.67	4,027.74
Total .....	\$32,700.67	\$36,391.09	\$3,690.42

(c) Three-fourths, instead of one-half, of the \$652.13 taxes on Wilshire Boulevard property is deductible by you.

## Computation of Alternative Tax

Taxable Year Ended December 31, 1940

Net income adjusted .....	\$54,925.79
Minus: Net long-term capital gain .....	1,850.46
Ordinary net income .....	\$53,075.33
Less: Personal exemption .....	\$ 2,000.00
Credit for dependents .....	1,600.00
Balance (surtax net income) .....	\$49,475.33
Less: Earned income credit .....	1,225.78
Net income subject to normal tax .....	\$48,249.55
Normal tax at 4% on \$48,249.55 .....	\$ 1,929.98
Surtax on \$49,475.33 .....	11,570.13
<b>Partial tax</b> .....	<b>\$13,500.11</b>
Plus: 30% of net long-term capital gain .....	555.14
Alternative tax .....	\$14,055.25

## Computation of Tax

Taxable Year Ended December 31, 1940

Net income adjusted .....		\$54,925.79
Less: Personal exemption .....	\$ 2,000.00	
Credit for dependents .....	1,600.00	3,600.00
Balance (surtax net income) .....		\$51,325.79
Less: Earned income credit .....		1,225.78
Net income subject to normal tax .....		\$50,100.01
Normal tax at 4% on \$50,100.01 .....	\$ 2,004.00	
Surtax on \$51,325.79 .....	12,363.35	
Total normal tax and surtax .....		\$14,367.35
Alternative tax .....		\$14,055.25
Defense tax (10% of \$14,055.25) .....		1,405.53
Total income tax .....		\$15,460.78
Less: Income tax paid at source .....		7.00
Correct income tax liability .....		\$15,453.78
Income tax assessed:		
Original, account No. 204720 .....		13,716.28
Deficiency of income tax .....		\$ 1,737.50

## Adjustments to Net Income

Taxable Year Ended December 31, 1941

Net income as disclosed by return .....	\$72,229.47
Additional income:	
(a) Long-term capital gain .....	\$ 786.00
(b) Trust income .....	1,702.23      2,488.23
Net income adjusted .....	<u>\$74,717.70</u>

## Explanation of Adjustments

(a) The long-term capital loss of \$307.50 claimed from the sale of 100 shares of Signal Oil & Gas Company stock is adjusted to a long-term capital gain of \$478.50 due to a decrease of \$1,572.00 on the basis of the stock sold.

(b) Income from "Chandler Trust No. 1" and "Chandler Trust No. 2" taxable to you has been adjusted as follows:

	Amount re- ported in your return	Amount deter- mined taxable to you	Addition to income (reduction)
"Chandler Trust No. 1" .....	\$23,311.10	\$22,977.17	(\$333.93)
"Chandler Trust No. 2" .....	10,527.69	12,563.85	2,036.16
Total .....	<u>\$33,838.79</u>	<u>\$35,541.02</u>	<u>\$1,702.23</u>

## Computation of Alternative Tax

Taxable Year Ended December 31, 1941

Net income adjusted .....	\$74,717.70
Plus: Net long-term capital loss .....	2,213.39
Ordinary net income .....	<u>\$76,931.09</u>
Less: Personal exemption .....	\$ 1,500.00
Credit for dependents .....	1,600.00      4,100.00
Balance (surtax net income) .....	<u>\$72,831.09</u>
Less: Earned income credit .....	1,400.00
Net income subject to normal tax .....	<u>\$71,431.09</u>
Normal tax at 4% on \$71,431.09 .....	\$ 2,857.24
Surtax on \$72,831.09 .....	32,706.96
Partial tax .....	<u>\$35,564.20</u>
Minus: 30% of net long-term capital loss .....	664.02
Alternative tax .....	<u>\$34,900.18</u>

## Computation of Tax

Taxable Year Ended December 31, 1941

Net income adjusted .....		\$74,717.70
Less: Personal exemption .....	\$ 1,500.00	
Credit for dependents .....	1,600.00	3,100.00
		<hr/>
Balance (surtax net income) .....		\$71,617.70
Less: Earned income credit .....		1,400.00
		<hr/>
Net income subject to normal tax .....		\$70,217.70
Normal tax at 4% on \$70,217.70 .....	\$ 2,808.71	
Surtax on \$71,617.70 .....	31,966.80	
		<hr/>
Total .....		\$34,775.51
Alternative tax .....		\$34,900.18
Total income tax .....		\$34,900.18
Less: Income tax paid at source .....		7.00
		<hr/>
Correct income tax liability .....		\$34,893.18
Income tax assessed:		
Original, account No. 336636 .....		34,201.94
		<hr/>
Deficiency of income tax .....		\$ 691.24

Received and filed Sept. 27, 1943, T.C.U.S.

[Title Tax Court and Cause.]

Docket No. 3041

## ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I. and II.

Admits the allegations contained in paragraphs I and II of the petition.

III.

Admits that the taxes in controversy are income taxes for the calendar years 1938 to 1941, inclusive, but denies that the total of the proposed deficiencies, aggregating \$6,025.33, is in controversy.

IV.

(1) to (6), inclusive. Denies that the respondent erred as alleged in subparagraphs (1) to (6), inclusive, of paragraph IV of the petition.

V.

(1) and (2). Admits the allegations contained in subparagraphs (1) and (2) of paragraph V of the petition.

(3). Admits that petitioner, in her income tax return for 1938, reported \$8,118.59 as income from Trust No. 2. Admits that respondent determined that the amount reportable from said source was \$11,446.46, and accordingly increased taxable net income reported by petitioner by \$3,327.87. Denies that respondent's determination was erroneous, and denies the remaining allegations contained in subparagraph (3) of paragraph V of the petition.

(4). Admits that petitioner, in her income tax

return for 1939, reported \$8,389.89 as income from Trust No. 2. Admits that respondent determined that the amount reportable from said source was \$12,418.07, and accordingly increased taxable net income reported by petitioner by \$4,028.18. Denies that respondent's determination was erroneous, and denies the remaining allegations contained in subparagraph (4) of paragraph V of the petition.

(5). Denies the allegations contained in subparagraph (5) of paragraph V of the petition.

(6). Admits that petitioner, in her income tax return for 1940, reported \$9,385.93 as income from Trust No. 2. Admits that respondent determined that the amount reportable from said source was \$13,413.67, and accordingly increased taxable net income reported by petitioner by \$4,027.74. Denies that respondent's determination was erroneous, and denies the remaining allegations contained in subparagraph (6) of paragraph V of the petition.

(7). Admits that petitioner, in her income tax return for 1941, reported \$10,527.69 as income from Trust No. 2. Admits that respondent determined that the amount reportable from said source was \$12,563.85, and accordingly increased taxable net income reported by petitioner by \$2,036.16. Denies that respondent's determination was erroneous, and denies the remaining allegations contained in subparagraph (7) of paragraph V of the petition.

(8). Denies the allegations contained in subparagraph (8) of paragraph V of the petition.

VI.

Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,  
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,  
Division Counsel.

HAROLD D. THOMAS,  
Special Attorney, Bureau of Internal Revenue.

Received and filed November 17, 1943, T.C.U.S.



The Tax Court of the United States, Washington

Docket No. 3041

RUTH C. WILLIAMSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

### DECISION

Pursuant to the Opinion of this Court, promulgated May 23, 1949, it is

Ordered and Decided: That there are deficiencies in income tax for the calendar years 1938, 1939, and 1941 in the respective amounts of \$96.65, \$1,583.92, and \$234.79; and that there is an overpayment in income tax for the calendar year 1940 in the amount of \$48.66, which overpayment was made within three years before the filing of the petition.

/s/ WILLIAM W. ARNOLD,  
Judge.

Entered May 24, 1949.

Served May 25, 1949.

In the United States Court of Appeals  
for the Ninth Circuit

Docket No. 3041

COMMISSIONER OF INTERNAL REVENUE,  
Petitioner on Review,  
vs.

RUTH C. WILLIAMSON,  
Respondent on Review.

PETITION FOR REVIEW

To the Honorable Judges of the United States Court  
of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by The Tax Court of the United States on November 30, 1949, "That there are deficiencies in income tax for the calendar years 1938, 1939, and 1941 in the respective amounts of \$96.65, \$1,583.92, and \$234.79, and that there is an overpayment in income tax for the calendar year 1940 in the amount of \$48.66" in respect of the Federal income tax liability of Ruth C. Williamson, the above-named respondent on review. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The respondent on review, Ruth C. Williamson, is a resident of Pasadena, California, and filed her Federal income tax returns for the years 1938, 1939, 1940 and 1941 with the Collector of Internal Revenue for the Sixth District of California, whose

office is in Los Angeles, California, and within the jurisdiction of the United States Court of Appeals for the Ninth Circuit wherein this review is sought.

### Nature of Controversy

The issue presented to and passed upon by The Tax Court of the United States and which was decided contrary to the Commissioner's determination is whether certain taxable stock dividends which were received by Chandler Trust No. 2, of which trust the respondent on review was one of the life tenant trustors, are taxable to the life tenant trustors of the trust, as determined by the Commissioner, or, as claimed by the taxpayer, to the trust itself. The Tax Court held, contrary to the Commissioner's determination, that Sections 22(a), 166, and 167 of the Revenue Act of 1938 and the Internal Revenue Code are inapplicable and that the stock dividends in question are taxable to the trust rather than to the life tenant beneficiaries and trustors. The Commissioner's determination in this and related cases was thus disapproved in so far as it reflected the Commissioner's inclusion of an allocated portion of the taxable stock dividends in the taxable income of each of the life tenant trustors for the years here involved.

/s/ THERON L. CAUDLE,

Assistant Attorney General.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of Internal Revenue, Attorneys for the Petitioner on Review.

Received and filed February 17, 1950, U.S.C.A.

[Title of Court of Appeals and Cause.]

Docket No. 3041

## STATEMENT OF POINTS

Comes now the Commissioner of Internal Revenue, petitioner on review in the above-entitled cause, by and through his attorneys, Theron L. Caudle, Assistant Attorney General, and Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and hereby states that he intends to rely upon the following points in this proceedings:

The Tax Court of the United States erred:

1. In ordering and deciding that there are deficiencies in income tax for the calendar years 1938, 1939, and 1941 in the respective amounts of \$96.65, \$1,583.92, and \$234.70; and that there is an overpayment in income tax for the calendar year 1940 in the amount of \$48.66.

2. In failing and refusing to sustain the deficiencies in tax determined by the Commissioner, as modified by the stipulation of the parties, on the basis that the stock dividends received by the Chandler Trust No. 2 were taxable to the life tenant trustors.

3. In holding that the Chandler Trust No. 2 was, for Federal income tax purposes, a valid trust under the laws of California.

4. In failing and refusing to hold and decide that

the Chandler Trust No. 2 was, by virtue of the rights of amendment or modification reserved by the trustors, not a valid trust for Federal income tax purposes and that, accordingly, the taxable stock dividends received by the trust during the taxable years were taxable to the life tenant trustors under Sections 22(a) and/or Sections 166 and 167 of the Revenue Act of 1938 and the Internal Revenue Code, rather than to the trust itself.

5. In holding that Sections 22(a), 166, and 167 of the Revenue Act of 1938 and the Internal Revenue Code are inapplicable.

6. In denying the Commissioner's motion to reconsider and set aside the Court's findings of fact and opinion.

7. In that its opinion and decision are contrary to the facts as stipulated by the parties.

8. In that its opinion and its decision are contrary to law and the Commissioner's regulations.

/s/ THERON L. CAUDLE,  
Assistant Attorney General.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue, Attor-  
neys for Petitioner on Review.

Statement of service attached.

Received and filed May 4, 1950, U.S.C.A.

[Title of Tax Court and Cause.]

Docket Nos. 3033, 3036, 3037, 3038, 3039, 3040 and  
3041.

### CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents 1 to 152, inclusive, constitute and are all of the original papers and proceedings on file in my office as the original and complete record in the above proceedings, and in which the respondents in The Tax Court proceedings have initiated appeals as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

[Seal]      /s/ VICTOR S. MERSCH,  
Clerk.

[Endorsed]: No. 12550. United States Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. May Chandler Goodan, et al., Respondent. Commissioner of Internal Revenue, Petitioner, vs. Marian Otis Chandler, Respondent. Commissioner of Internal Revenue, Petitioner, vs. Norman Chandler, Respondent. Commissioner of Internal Revenue, Petitioner, vs. Philip Chandler, Respondent. Commissioner of Internal Revenue, Petitioner, vs. Constance Chandler Crowe, Respondent, Commissioner of Internal Revenue, Petitioner; vs. Helen Chandler Garland, Respondent. Commissioner of Internal Revenue, Petitioner, vs. Ruth C. Williamson, Respondent. Transcript of Record. Petitions to Review Decisions of the Tax Court of the United States.

Filed: May 19, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk.



In the United States Court of Appeals  
for the Ninth Circuit

No. 12550

COMMISSIONER OF INTERNAL REVENUE,  
Petitioner,

vs.

MAY CHANDLER GOODAN, MARIAN OTIS  
CHANDLER, NORMAN CHANDLER,  
PHILIP CHANDLER, CONSTANCE  
CHANDLER CROWE, HELEN CHAN-  
DLER GARLAND, and RUTH C. WILLIAM-  
SON,

Respondents.

### DESIGNATION FOR PRINTING

The following portions of the record are designated to be printed:

The petitions for redetermination in Tax Court Docket Nos. 3033 and 3036 to 3041.

The answers in Tax Court Docket Nos. 3033 and 3036 to 3041.

The opinion in Tax Court Docket Nos. 3033 and 3036 to 3041.

The decisions in Tax Court Docket Nos. 3033 and 3036 to 3041.

The motion to vacate decisions in Tax Court Docket Nos. 3033 and 3036 to 3041.

The order vacating decisions in Tax Court Docket Nos. 3033 and 3036 to 3041.

The order denying respondent's motion to reconsider and set aside in Tax Court Docket Nos. 3033 and 3036 to 3041.

The petitions for review and proofs of service in Tax Court Docket Nos. 3033 and 3036 to 3041.

The statement of points in Tax Court Docket Nos. 3033 and 3036 to 3041.

The stipulation of facts and exhibits 1A, 2B and 3C attached thereto in Tax Court Docket Nos. 3033 and 3036 to 3041.

/s/ THERON LAMAR CAUDLE,  
Assistant Attorney General,  
Counsel for Petitioner.

Dated May . ., 1950.

[Endorsed]: Filed May 29, 1950.

[Title of Court of Appeals and Cause.]

No. 12550

SUBSTITUTION OF ATTORNEYS

May Chandler Goodan, Respondent on Review herein, hereby substitutes Mackay, McGregor, Reynolds & Bennion as her attorneys in this proceeding in lieu of William Galbally, Jr.

Dated May 24, 1950.

/s/ MAY CHANDLER GOODAN.

I hereby consent to the foregoing substitution of attorneys.

Dated May 10th, 1950.

/s/ WILLIAM GALBALLY, JR.

We hereby accept the foregoing substitution of attorneys in lieu of William Galbally, Jr.

Dated May 31, 1950.

MACKAY, MCGREGOR,  
REYNOLDS & BENNION,

By /s/ A. CALDER MACKAY.

[Endorsed]: Filed June 3, 1950.

[Title of Court of Appeals and Cause.]

No. 12550

STIPULATION AND ORDER

Re Exhibits

It is hereby agreed and stipulated by counsel in the above-entitled cases that the original exhibits may be excluded from the printed record but may be referred to by the parties in brief and argument as if part of that record.

/s/ THERON LAMAR CAUDLE,  
Assistant Attorney General,  
Counsel for Petitioner.

By /s/ A. CALDER MACKAY.

/s/ ADAM Y. BENNION,  
Counsel for Respondents.

So ordered:

/s/ WILLIAM DENMAN,  
Chief Judge.

/s/ HOMER T. BONE,

/s/ WALTER L. POPE,  
United States Circuit Judges.

Dated June 13, 1950.

[Endorsed] Filed June 27, 1950.

**In the United States Court of Appeals  
for the Ninth Circuit**

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COMMISSIONER OF INTERNAL REVENUE, PETITIONER  
v.

MAY CHANDLER GOODAN, RESPONDENT

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COMMISSIONER OF INTERNAL REVENUE, PETITIONER  
v.

MARIAN OTIS CHANDLER, RESPONDENT

---

COMMISSIONER OF INTERNAL REVENUE, PETITIONER  
v.

NORMAN CHANDLER, RESPONDENT

---

COMMISSIONER OF INTERNAL REVENUE, PETITIONER  
v.

PHILIP CHANDLER, RESPONDENT

---

COMMISSIONER OF INTERNAL REVENUE, PETITIONER  
v.

CONSTANCE CHANDLER CROWE, RESPONDENT

---

COMMISSIONER OF INTERNAL REVENUE, PETITIONER  
v.

HELEN CHANDLER GARLAND, RESPONDENT

---

COMMISSIONER OF INTERNAL REVENUE, PETITIONER  
v.

RUTH C. WILLIAMSON, RESPONDENT

---

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX  
COURT OF THE UNITED STATES

---

**BRIEF FOR THE PETITIONER**

---

THERON LAMAR CAUDLE,  
*Assistant Attorney General.*

ELLIS N. SLACK,  
HELEN GOODNER,  
LOUISE FOSTER,

*Special Assistants to the Attorney General.*

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**FILED**

SEP 25 1950



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**In the United States Court of Appeals  
for the Ninth Circuit**

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No. 12550

COMMISSIONER OF INTERNAL REVENUE, PETITIONER  
v.

MAY CHANDLER GOODAN, RESPONDENT

---

COMMISSIONER OF INTERNAL REVENUE, PETITIONER  
v.

MARIAN OTIS CHANDLER, RESPONDENT

---

COMMISSIONER OF INTERNAL REVENUE, PETITIONER  
v.

NORMAN CHANDLER, RESPONDENT

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v.

PHILIP CHANDLER, RESPONDENT

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COMMISSIONER OF INTERNAL REVENUE, PETITIONER  
v.

CONSTANCE CHANDLER CROWE, RESPONDENT

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COMMISSIONER OF INTERNAL REVENUE, PETITIONER  
v.

HELEN CHANDLER GARLAND, RESPONDENT

---

COMMISSIONER OF INTERNAL REVENUE, PETITIONER  
v.

RUTH C. WILLIAMSON, RESPONDENT

---

*ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX  
COURT OF THE UNITED STATES*

---

**BRIEF FOR THE PETITIONER**

---

OPINION BELOW

The opinion of the Tax Court (R. 30-70) is reported  
at 12 T. C. 817.

JURISDICTION

These petitions for review involve income taxes for  
the calendar years 1938, 1939, 1940 and 1941. (R. 82-83,

106-107, 132-133, 158-160, 185-186, 208-209, 233-234.) On June 30, 1943, the Commissioner of Internal Revenue mailed notices of deficiency to the taxpayers herein. (R. 8-9, 92-93, 116-117, 142-143, 171-172, 195-196, 219-220.) Within ninety days thereafter, i. e., on September 27, 1943, the taxpayers filed their petitions with the Tax Court for redetermination of the deficiencies under Section 272 of the Internal Revenue Code. (R. 2-16, 86-101, 110-127, 136-154, 163-179, 189-203, 212-228.) The Tax Court entered its decisions on May 24, 1949, but inasmuch as the Commissioner filed a motion to vacate the decisions and also a motion to reconsider and set aside the Tax Court's findings of fact and opinion, hearing was held on such motions on June 13, 1949, and the decisions were vacated on August 15, 1949, pending further consideration of the motions. (R. 74.) After such consideration, the Tax Court decided to reenter the vacated decisions (R. 80) and on November 30, 1949, entered an order denying the Commissioner's motions (R. 75). Accordingly, the Tax Court adopted the deficiencies and overpayments which it had originally approved. For individual decisions see the record at pages 81, 105, 131, 157-158, 184, 207 and 232.<sup>1</sup> The petitions for review by this Court were filed February 17, 1950 (R. 82-83, 106-107, 132-133, 158-160, 185-186, 208-209, 233-234), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.<sup>2</sup>

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<sup>1</sup> Some of the decisions printed in the record are dated as entered May 24, 1949, and others as entered November 30, 1949. As explained above, the original decisions entered May 24, 1949, were vacated and the identical decisions were later reentered on November 30, 1949. The petitions for review relate to the November 30, 1949, decisions. Apparently in some of the cases, the earlier decisions were erroneously printed but except for date they are substantially the same as the decisions appealed from.

<sup>2</sup> The record erroneously gives (R. 107) the date for filing the petition for review in the case of Marian Otis Chandler as November 17, 1943, but the correct filing date is that given above.

## QUESTIONS PRESENTED

1. Whether the taxpayers who are the grantors, trustees and principal beneficiaries of the family trust involved here are subject to tax under Section 22 (a) of the Revenue Act of 1938 and of the Internal Revenue Code on taxable stock dividends which were received by the trust in the taxable years and were added by the trustees to the corpus of the trust.

2. Whether such stock dividends were taxable to the taxpayers herein as grantors of the trust under Section 167 of the Revenue Act of 1938 and the Internal Revenue Code.

## STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the applicable statutes and Regulations involved are set forth in the Appendix.

## STATEMENT

The facts as found by the Tax Court (R. 31-50) are as follows:

The trust involved herein, Chandler Trust No. 2, was created on June 26, 1935, by a trust agreement which was executed by the taxpayers and Harrison G. O. Chandler, all of whom are not only trustors but also trustees. At no time since its execution has the trust agreement been altered, amended or modified. (R. 31.)

Marian Otis Chandler (one of the taxpayers here) is the mother of Harrison G. O. Chandler and the other six taxpayers. On June 26, 1935, she was 68 years of age, her children ranged from 42 to 28 years of age, and her 13 grandchildren from 18 years to two months. All of these individuals are living at the present time, except one grandchild, who died in June, 1943. (R. 31.)

At the time the trust agreement was executed Marian Otis Chandler conveyed to the present trustees

and their successors 16,536 shares of stock of Chandis Securities Company, hereinafter referred to as Chandis. Each of the other seven trustors conveyed to the present trustees and their successors a certificate representing 50 shares of stock of The Times-Mirror Company, hereinafter referred to as The Times, and each also conveyed two certificates representing 2,694 shares of stock of Chandis. The certificates of stock were endorsed by the respective trustors on June 27, 1935, and delivered to The Times and Chandis for cancellation. A new certificate representing 350 shares was issued by The Times and a new certificate representing 35,394 shares was issued by Chandis in the names of, and delivered to, the trustees on June 27, 1935. From that date to the present time, the trustees (who are the taxpayers here) have kept the certificates. (R. 31-32.)

The trust indenture, after specifically naming the taxpayers and Harrison G. O. Chandler as "the Trustors", as "the 'present Trustees'" and as "the 'present beneficiaries'", states the purpose as follows (R. 32-33):

That, Whereas the Trustors deem it to be for their best interest, and for the best interests of The Times-Mirror Company and the Chandis Securities Company, that there should be a continuity and stability of policy and management, and to that end that the interests of each of the Trustors in said corporations, as evidenced by the stock severally held by them, be united and vested in the Trustees, as hereinafter provided; and

Whereas, the Trustors deem it also to be for their best interests that there should be held, conserved, administered and eventually distributed, according to the terms hereof, those assets which are respectively contributed by them to the Trust Estate;

\*

\*

\*

\*

\*

Article I of the trust indenture segregates the trust corpus into two parts by providing that one part (R. 33)—

\* \* \* shall consist of all of the shares of capital stock of The Times-Mirror Company delivered to the Trustees hereunder, and the other part shall consist of all of the shares of the capital stock of Chandis Securities Company delivered to the Trustees hereunder, and such division and segregation shall be continued throughout the term of this trust.

Article I also provides that the legal and equitable title to the trust estate is to be vested in the trustees and that no interest therein (R. 33)—

is, or at any time shall be, deemed to be vested in any of the beneficiaries hereunder. The interests of the beneficiaries shall at all times consist only and solely of the right to enforce the due performance of this trust.

Article II, which deals with the gross income from the trust, provides that gross income from each division of the trust estate (The Times stock and the Chandis stock) shall be charged with the taxes, costs, charges and expenses applicable to administering, protecting and distributing that portion of the trust estate. General and indirect costs, charges and expenses were to be allocated to the two parts as the trustees determined. (R. 33-34.)

Article III, dealing with the distribution of the net income, provides that the (R. 34)—

entire net income received from the trust estate and available in cash for distribution, shall be paid in monthly, quarterly, or other convenient installments

as the trustees may from time to time determine. The net income from The Times stock is to be distributed

in equal shares to the seven individuals who contributed that stock and the net income from the Chandis stock to be distributed during the lives of the eight trustors in proportion to the stock of that company which each had contributed. (R. 34.)

Article III also provides as follows (R. 34-35):

There is hereby expressly reserved to each of the Trustors, during his or her lifetime, the absolute power of appointment and disposition of his or her share of the principal and income of the Trust Estate after his or her death, the same to be exercised not by Will, but only by the last written instrument exercising such power on file with the Trustees at such Trustor's death. Such power may be exercised, but only in the manner herein specified, from time to time, and each exercise thereof may be similarly revoked.

Failing such appointment and disposition so on file at the time of trustor's death, the trust income to which a deceased trustor would have been entitled is to be distributed to his or her spouse for life, then to their issue, if any, then to the living heirs of such trustor, during their respective lives until termination of the trust. Similarly, the trustor's share of principal upon termination of the trust is vested in and distributed to his or her then living issue in equal shares, *per stirpes*, if none survived then to the living heirs-at-law, the identity and respective shares of which is to be determined by California law in force at the time of the trustor's death. (R. 35.)

Article IV provides that the trust (R. 35)—

shall cease upon, and in no event shall its duration extend beyond, the death of the last survivor of the following named persons, \* \* \*.

The 21 persons named in the trust indenture were the eight trustors and 13 grandchildren referred to above. (R. 35.)



Article V, entitled "As to Trustees", provides that when the "present Trustees" shall have been reduced to three in number, the survivors shall appoint and constitute additional trustees so that there shall always be, except for temporary vacancies, seven trustees until the termination of the trust. The additional trustees were to be selected, so far as possible, from the then beneficiaries of the trust, "giving preference to those who may be executives of" The Times and Chandis, "so long as shares of stock of the respective companies are held in the Trust Estate". Other persons, including a bank or trust company, could be selected as additional trustees, but a majority of the trustees who were at the same time beneficiaries, could remove any or all of such other persons. Long continued absence from the County of Los Angeles, or California, or incapacity or inability to act constituted valid reasons for removal of any trustee by the remaining trustees, whether a beneficiary or not. Except in instances where unanimity or determination by trustees who are also beneficiaries is specifically provided, the decision of a majority of the trustees shall be deemed the decision of all. (R. 35-36.)

The trustees are authorized to choose a chairman and a secretary from their number and also one or more special custodians of funds or property, and one or more for the collection and disbursement of funds of the trust estate. The trustees can appoint other agents, depositaries, auditors, advisers, brokers, attorneys and consultants. They are required to adopt rules of procedure for their meetings, keep records, fix regular places and times for meetings with provision for notice thereof, all as they may from time to time determine in the efficient administration of the trust estate. The books of account, minutes of meetings and other records of the trust are to be subject to inspection to such extent

as the trustees may from time to time determine. (R. 36.)

Article VI, entitled "Powers of the Trustees", provides as follows (R. 37-44) :

The Trustees are specifically empowered to receive and collect the principal and income of the Trust Estate, invest and reinvest the principal available therefor, and as hereinabove provided, to pay, accumulate, use and apply the income, and at the termination of the trust, to distribute the principal of the Trust Estate.

To carry out the express purposes of this trust, and in aid of its execution, and the proper administration, management and distribution of the Trust Estate, the Trustees are vested with the following additional powers and discretions:

(1) The shares of stock [of] The Times Mirror Company, hereinabove described, and the shares of stock of Chandis Securities Company, hereinabove described, shall be sold, exchanged, or otherwise disposed of only by the unanimous decision of the present or succeeding Trustees herein named; after the present and succeeding Trustees herein named are reduced to three in number, by the unanimous decision of the Trustees who are then beneficiaries hereunder;

(2) Similar unanimity shall be required for a determination of the Trustees to borrow upon or pledge, or in any manner hypothecate or alienate or transfer or otherwise dispose of any interest in or to said shares. No portion, or less than the entire number of said shares, shall be sold, pledged, or otherwise disposed of, except in the event of such emergency that such partial disposition shall serve to avert the loss of the whole, or to protect the remaining shares.

In aid of the determination to be arrived at by the Trustees in the situations herein contemplated, it is the Trustors' desire and request that

the powers herein conferred, which are contingent upon the unanimous decision of the Trustees, shall be exercised only to maintain such a proportionate interest as is now represented in The Times Mirror Company and Chandis Securities Company, or in the event of an emergency, to protect as much thereof as may be possible under such circumstances;

(3) It being the desire of all the parties hereto that Norman Chandler shall eventually succeed to the position of President and General Manager of the Times Mirror Company, the Trustees shall vote said shares for such Directors as will carry out this desire. The unanimous decision of the Trustees shall be required in order to vote for such Directors as will not choose Norman Chandler as the President and General Manager of the Times Mirror Company, but if it should be unanimously determined that some one other than Norman Chandler shall be President and General Manager of The Times Mirror Company, then a decision by a majority of the Trustees shall be sufficient to choose his successor;

(4) The unanimous decision of all of the Trustees shall be requisite to exercise the following powers with reference to the stock of The Times Mirror Company and Chandis Securities Company, so long as it shall constitute a part of the Trust Estate:

(a) To vote for any increase of capitalization of The Times Mirror Company and/or Chandis Securities Company, which increase is proposed to be sold to the stockholders, or others, and not issued by way of stock dividend;

(b) To vote for or consent to the incurring of any bonded indebtedness or other long term loan which requires the approval of stockholders, or shall be submitted to them;

(c) To vote for or consent to any new classes of stock, or any reclassification of stock which might vary the rights of stockholders as to voting or other preferences;

(d) To enter into any voting trust or other lawful agreement with other stockholders for the purpose of concentrating or unifying the control of stock of The Times Mirror Company and/or Chandis Securities Company, and to deposit shares under such agreement;

(5) The Trustee, if the shares of stock of The Times Mirror Company and/or Chandis Securities Company should be sold or otherwise disposed of, or if there should be any liquidation, partial or otherwise, of the assets thereof, or a distribution to the stockholders thereof of any proceeds of sale as a result of which assets of substantially different character are received by the Trustees, then and in that event, but not otherwise, are vested with the following additional powers and discretions:

(a) To retain such property and to continue to operate any business in connection therewith for such time as the Trustees may deem advisable or expedient;

(b) To manage, control, sell, convey, exchange, or otherwise dispose of, or partition, divide, sub-divide, improve or repair such property and in connection with its disposal, to grant options and to sell upon deferred payments;

(c) To borrow upon, mortgage, pledge, or otherwise encumber such property;

(d) To lease such property, or any part thereof, for terms extending beyond the duration of this trust, and to grant for like terms the right to mine, or drill for and remove therefrom gas, oil and other minerals;

(e) Respecting bonds, shares of stock and other securities, notes, accounts and other choses in action, to have and exercise all the rights, powers and privileges of an owner, including (though without limiting the foregoing) voting, giving of proxies, payments of assessments and other sums deemed by the Trustees to be expedient for the protection thereof, assenting to corporate sales, leases and encumbrances, participating in voting trusts and pooling agreements, selling or exercising stock subscription or conversion rights, participating in foreclosures, reorganizations, mergers and liquidations, and in connection therewith depositing securities with protective or other committees, on such terms as the Trustees may deem expedient; to sue upon or otherwise enforce collection of any note or other obligation, or to compromise any claim or demand based thereon;

(f) To invest such principal receipts as are in the form of cash in conservative securities to such an extent as the Trustees shall deem advisable or expedient, but such investment of cash shall not be limited to conservative securities if the Trustees shall deem that any one or more of the following courses shall better protect the Trust Estate, or shall be more conservative as providing for a greater diversification:

(1) To purchase property, whether real or personal, to such extent as the Trustees may deem expedient or desirable, as providing protection from the possibility of monetary disorders or securities devaluations or deflations, or monetary or other inflation, or to avert or lighten onerous taxes or other Governmental charges;

(2) To make such conservative loans or advances upon collateral or upon real estate for such term, either within or extending

beyond the duration of this trust and at such rate of interest as the Trustees may deem to be for the best interests of the Trust Estate;

The enumeration of those certain powers and discretions of the Trustees, as are set out in this Paragraph (5) shall not be construed as limiting the general powers and discretions herein vested in the Trustees, it being the intent of the Trustors that in the events provided for in this Paragraph, the Trustees shall have, and they are hereby vested with, all of the powers and discretions that an absolute owner of property has or may have.

(6) Regardless of the character of the Trust Estate, the Trustes [Trustees] shall have the following general powers and discretions:

(a) To determine in their discretion what is principal of the Trust Estate, gross income or net distributable income therefrom; except that all bonuses, royalties and recoveries from mines, gas or oil leases or wells, all stock dividends and proceeds of sale of stock rights and all gain or loss which may result from the payment, retirement or sale of stocks, notes, bonds or other securities, or on foreclosure or other realization upon mortgages and trust deeds, shall inure to or fall upon principal, and all cash dividends (other than liquidating dividends stated in writing to be such by the corporation paying the same, or proved to the satisfaction of the Trustees to be such prior to its disbursement thereof) shall go to income of the Trust Estate. The net income from real property acquired by the Trustees on or by acceptance of conveyance in lieu of foreclosure, shall go to income of the Trust Estate. Brokers' or other commissions and expenses on purchase or sale of trust property shall be charged against principal;



(b) To hold property of the Trust Estate in their own names, or in the names of one or more of their number, or in the name of their nominee, with or without disclosing such fiduciary relationship;

(c) To appoint or employ servants, including agents, auditors, brokers, attorneys and other consultants and advisers, and provide for their compensation;

Any Trustee who is not a beneficiary may receive such reasonable compensation for his services as Trustee, as the remaining Trustees may agree upon at the time of his or its appointment. Any Trustee may be compensated for any special or extraordinary or unusual services if such compensation shall be agreed upon in advance of the rendition of such services;

(d) The Trustees may maintain and administer the Trust Estate undivided and as a unit, and shall not be required to make physical division or segregation thereof, except if, when and to the extent required to make distribution thereof, as in this trust provided, but the Trust Estate shall be deemed to be theoretically divided into as many units as there are beneficiaries and in proportion to their respective interest in the income;

(e) To allot, partition and distribute the Trust Estate for such valuations and according to such method or procedure as the Trustees may determine upon, and to do so in kind, or partly in kind and partly in money, according to their valuation thereof;

(f) To construe this agreement, and the construction of the same made in good faith shall be final, conclusive and binding upon all beneficiaries;

All discretions in this trust conferred upon the Trustees shall, unless specifically limited, be ab-



solute and their exercise shall be conclusive on all persons interested in this trust or the Trust Estate.

Article VII, entitled "Liabilities of the Trustees", specifies that the trustees assume no personal liability in respect of any action taken by them, except for gross negligence or willful misconduct. It also provides that any trustee may be a member, shareholder, director, officer or trustee of any other corporation, firm, trust or association with which the trustees may deal; may become pecuniarily interested in any matter or transaction to which the trustee may be a party, provided the nature of such relationship is fully disclosed to the remaining trustees; may buy from, sell to, or deal with the trustees so long as a majority of all the trustees have notice of such interest of such trustee in the transaction and shall approve thereof. The trustees shall render to the beneficiaries an annual statement of receipts, disbursements and assets as soon after the close of the fiscal period as practicable. The approval of such account by the adult beneficiaries competent to act constitutes a full and complete acquittance and discharge of the trustees as to the transactions, receipts and disbursements reflected therein. (R. 44-45.)

Article VIII is entitled "As to Beneficiaries". It contains provisions restraining each beneficiary from alienating, anticipating, encumbering or in other manner assigning his or her interest, and other provisions common to so-called spendthrift trusts. (R. 45.) It also provides in part as follows (R. 45-46):

If any beneficiary shall, either directly or indirectly, singly or in conjunction with other persons, seek to establish or assert any claim to the Trust Estate or to the income therefrom except as it herein specifically provided, or shall attempt to impair, invalidate or set aside any of the provi-

sions hereof, or to have the same or any part thereof declared void or diminished, or to defeat or change any part of the plan of administration and distribution, as contemplated hereby, or shall attempt to settle or compromise, directly or indirectly, either in or out of court, with any persons seeking so to do, or shall consent or acquiesce in, or fail to contest such proceedings, then and in that event, anything to the contrary hereinabove stated notwithstanding, such person or persons shall thereupon cease to have any further interest or estate hereunder and the interest or share which would otherwise have gone to such person or persons shall go to augment the share or shares of those who shall not have joined in, assisted, consented to or acquiesced in such proceedings.

The beneficiaries hereunder shall have no control or authority over the Trustees in any particular whatsoever, their entire interest hereunder being to receive the income, and at the termination of this trust, the principal, in the manner and to the extent determined by the Trustees. The acts of the Trustees and the powers and discretions herein vested, shall, except for lack of good faith, be conclusive upon all beneficiaries hereunder.

Article IX is entitled "General Provisions". It provides that persons dealing with the trustees shall not be required to see to the application of the purchase money or other consideration passing to the trustees and were not required to see that the terms of the trust were complied with. The provisions of the trust agreement are declared to be severable, and the adjudged invalidity of any provision was not to effect the remaining provisions of the trust agreement. (R. 46.) The concluding paragraphs of Article IX provided as follows (R. 47):

This agreement and each and every provision hereof shall be, and is hereby, declared to be irrevocable and cannot be terminated by the parties

hereto, by the beneficiaries hereunder, or by any court or otherwise, prior to the expiration of its full term, as herein fixed;

Provided, however, that the Trustors, during their joint lives, have reserved, and do hereby reserve, the right by their unanimous agreement in writing and filed with the Trustees to modify, amend, construe, define or otherwise vary the terms of the provisions of Articles II, III, V, VI, VII and IX hereof, but no such modification shall be effective, directly or indirectly, to change the provisions as to the duration of this trust or the initial character of the Trust Estate, as provided in Articles I, IV, and VIII, the provisions of which last numbered Articles shall be in all respects and in each and every provision thereof be and remain irrevocable.

The total property owned by the trust during the taxable years consisted of (a) a small amount of cash; (b) 350 shares of stock of The Times; (c) 35,394 shares of common stock of Chandis; and (d) shares of preferred stock of Chandis, increasing from 884 shares at the end of 1937 to 3,541 shares at the end of 1941. (R. 47.)

The gross cash receipts of the trust for the taxable years are as follows (R. 48):

Cross Cash Receipts	1938	1939	1940	1941
Dividends on Times stock. . .	\$26,950.00	\$32,375.00	\$35,000.00	\$35,000.00
Dividends on Chandis stock. .	62,918.30	54,343.81	61,501.23	77,692.39
Total.....	\$89,868.30	\$86,718.81	\$97,501.23	\$112,692.39

The expenditures of the trust include small amounts paid for part-time clerical services in keeping the trust's books and records and amounts paid for California State income tax. (For exact amounts see R. 48.)

During the taxable years the trust received, as taxable stock dividends on its Chandis common stock, the following number of shares of Chandis preferred

stock, which had a fair market value equal to its par value (R. 48):

Year	Number of Preferred Shares	Fair Market Value
1938 .....	707	\$70,000.00
1939 .....	707	70,700.00
1940 .....	707	70,700.00
1941 .....	530	53,000.00

The trust reported these stock dividends on its income tax returns (R. 48) and paid the taxes thereon as follows (R. 49):

1938 .....	\$27,220.00
1939 .....	17,942.00
1940 .....	17,942.00
1941 .....	26,404.40

The above income taxes were paid with cash contributed by the taxpayers in accordance with their respective interests in the trust. (R. 49.)

The net cash income distributable and distributed under the terms of the trust agreement to the respective beneficiaries (who were also trustees and grantors of the trust here) was reported by the beneficiaries in their respective income tax returns and taxes were paid by them on such amounts individually. For the sums distributed see the record at page 49. (R. 49.)

The principal business of The Times is, and since 1881 has been, the publication of "The Los Angeles Times", a newspaper with daily morning and Sunday editions. It has one class of stock, of which 5,760 shares were outstanding during the taxable years. At all times since 1884 a majority of the stock of The Times has been owned, directly or indirectly, by the father of Marian Otis Chandler, General Harrison Gray Otis, and his descendants. (R. 49.) Immediately prior to the creation of the trust on June

26, 1935, shares of stock of The Times were owned as follows (R. 50):

Name of Stockholders	No. Shares
Marian Otis Chandler .....	1,634
May C. Goodan .....	50
Ruth C. Williamson .....	50
Helen C. Garland .....	50
Harrison G. O. Chandler .....	50
Philip Chandler .....	50
Constance Chandler .....	50
Norman Chandler .....	100
Estate of Frances C. Kirkpatrick .....	50
Harry Chandler .....	3
Chandis Securities Company .....	1,935
Others .....	1,738
Total .....	5,760

Chandis, which was a personal holding company during the years involved herein, was organized in 1916. On June 25, 1935, its outstanding stock consisted of 38,288 shares of common stock. Of these Marian Otis Chandler owned 16,536 shares, her seven living children and the estate of her deceased daughter each owned 2,694 shares, and Harry Chandler owned 200 shares. Preferred stock of Chandis was first authorized and issued in 1937, and on December 31, 1941, there were 5,954 shares of such preferred stock outstanding. The purpose of Chandis in authorizing and issuing taxable stock dividends during the taxable years was to enable it to obtain dividends paid credits and at the same time retain a portion of its earnings in order to liquidate its outstanding obligations and those of its wholly-owned subsidiary, Southwest Land Company. (R. 50.)

The Tax Court reached the conclusion (1) that the taxpayers here created a valid trust; (2) that they are not taxable under Section 22 (a) of the applicable revenue laws on that part of trust income consisting

of the stock dividends; (3) that the trust is not revocable under Section 166 of such laws; and (4) that the trust income, in so far as the stock dividends are concerned, was not being held or accumulated for future distribution for the benefit of the grantors within the meaning of Section 167. Consequently, it was decided that the stock dividends (the only income involved here) were not taxable to the taxpayers. (R. 51-69.)

Four of the Tax Court Judges dissented from this decision and joined in a dissenting opinion in which it was stated in substance that the powers retained by the taxpayers as grantors in Article IX of the trust indenture gave them such powers over the trust corpus that they should be held taxable on the stock dividends involved here. (R. 70.)

#### STATEMENT OF POINTS TO BE URGED

1. The Tax Court erred in not holding that the taxpayers are taxable under Section 22 (a) of the Revenue Act of 1938 and the Internal Revenue Code on the stock dividends received by the trust during the taxable years.

2. The Tax Court erred in holding that the taxpayers are not taxable on such stock dividends under Section 167 of the Revenue Act of 1938 and of the Internal Revenue Code.

3. The Tax Court erred in not sustaining the deficiencies determined by the Commissioner in the income taxes due from each of the taxpayers here.

#### SUMMARY OF ARGUMENT

1. The Tax Court erroneously held that the trust and not its eight grantors (seven of whom are taxpayers here) should be taxed on the stock dividends which were received and retained by the trust in the taxable years and which are admittedly subject to income tax. Despite



the trust form, in substance they remained the real owners of the corpus, including the stock dividends in question, because of the large bundle of rights they continued to have therein. Each grantor reserved the right to receive all of his share of trust income for life and the absolute power to appoint the corpus to any beneficiary, including his estate, thus enabling him to anticipate and enjoy the equivalent of the stock dividends during his life. The trust was voluntarily created by eight closely related members of a family which controlled the two corporations, the stocks of which formed the corpus, for the grantors' own "best interests"—primarily to assure the presidency and general managership of the Times-Mirror Company for Norman, one of the grantors and thus insure their managing control of that corporation. The grantors were also trustees and principal beneficiaries, indeed the only beneficiaries with vested and indefeasible interests. The benefits the trust gave to control the corporations at all times was patently more important to the taxpayers than any right individually as minority stockholders to vote their stock, which they surrendered. As trustees taxpayers had broad powers indicating that they were not intended to act in a real fiduciary capacity and giving them comprehensive control over the corpus. As grantors they had power unanimously to amend the trust agreement in many respects and thereby could cause the distribution of the stock dividends in question to themselves. The circumstance that many of their powers as trustees and the power to amend could be exercised only by unanimous action is not significant because the record here indicates that their interests were identical and that their views would be harmonious. Accordingly, it is clear that taxpayers remained the substantial owners of the property, despite the imposition of the trust form.

2. The stock dividends are also taxable to the taxpayers under Section 167 of the Revenue Act of 1938



and the Internal Revenue Code, which taxes the grantor of a trust on that part of trust income which, in his own discretion or that of any person having no substantial adverse interest in the disposition of such income, may be distributed to, or may be held for future distribution to the grantor. The grantors' power unanimously to amend the trust and take the stock dividends for themselves brings the stock dividends within this section, since no one grantor had any adverse interest in the disposition of the dividends allocable to the trust share of any other grantor. The power of each grantor, held and exercisable individually, to appoint his share of the corpus, including the stock dividends, effective after his death, also makes Section 167 applicable since the grantor could appoint his estate or even a creditor to take the corpus, and thus he could enjoy the equivalent of the dividends during his lifetime.

#### ARGUMENT

### I

**The Tax Court Erroneously Held That the Stock Dividends Received by the Trust During the Taxable Years Could Not Be Taxed to the Grantors of the Trust under Section 22 (a) of the Revenue Act of 1938 and the Internal Revenue Code**

The only question in this case is whether the stock dividends which are admittedly subject to income tax and which were received by the trust during the taxable years should be taxed to the eight grantors (seven of whom are taxpayers here) as the Commissioner determined, or to the trust as the Tax Court held. We submit that such dividends should be taxed to the grantors and that, in holding otherwise, the Tax Court has not only erroneously construed and applied pertinent provisions of the revenue law but has also incorrectly interpreted the provisions of the trust agreement here.

It is our first contention that authority for taxing the stock dividends to the grantors is found in the broad provisions of Section 22 (a) of the Revenue Act of 1938 and the Internal Revenue Code (Appendix, *infra*) which defines gross income as including gains, profits and income "of whatever kind and in whatever form paid". It is of course well established now that where a grantor of a trust retains in the property such rights as to make him in substance the owner of the property, he must be taxed under Section 22 (a) on the income of such trust regardless of whether the income is actually received by him; and it is our position that the provisions of the trust here bring this case within Section 22 (a). See *Gaylord v. Commissioner*, 153 F. 2d 408, 412-413 (C.A. 9th).

The leading case on this point is *Helvering v. Clifford*, 309 U. S. 331, in which the grantor of a trust was held taxable under Section 22 (a) on the trust income paid to his wife as the beneficiary entitled to receive all of the income. The trust there was to continue for a term of five years or until the prior death of the grantor or his wife, and upon termination of the trust, the corpus was to go to the grantor or to his estate but any undistributed income was to be treated as the wife's property. The grantor was named trustee with broad powers of control over the trust property. In holding the grantor liable for the tax, the Supreme Court pointed out that since he retained so many of the attributes of ownership, the creation of the trust had not caused any substantial change in his economic status and had left him for all practical purposes with most of the control which he had possessed as an individual. Thus the Court decided that the grantor should be treated as the owner of the trust corpus and of the income for the purposes of Section 22 (a). In reaching this conclusion, the Court reaffirmed (p. 334)

the frequently announced rule (*Corliss v. Bowers*, 281 U. S. 376, 378; *Burnet v. Wells*, 289 U. S. 670, 678; *Griffiths v. Commissioner*, 308 U. S. 355, 357-358; *Harrison v. Schaffner*, 312 U. S. 579) that legal technicalities or niceties of the law of trusts or conveyances should not be allowed to obscure the basic issue in tax cases, and pointed out (p. 334) that where the grantor is the trustee and the beneficiaries are members of his family group, special scrutiny of the arrangement is necessary, for purposes of determining whether the grantor is taxable on trust income under Section 22 (a).

The rule of the *Clifford* case has not been confined to the precise facts there presented. For example, the rule has been frequently applied in cases where the trust was not for a short term but for a long or indefinite term and also in cases where the corpus of the trust could never revert to the grantor. Thus in *Brown v. Commissioner*, 131 F. 2d 640 (C.A. 3d), certiorari denied, 318 U. S. 767, it was held that a grantor of a long-term trust was taxable on the income therefrom where she had the power to change the trustees and had reserved the power to change the shares of beneficial interest except that she could never direct payment to herself. See also *Stockstrom v. Commissioner* 148 F. 2d 491 (C.A. 8th); *Shapero v. Commissioner*, 165 F. 2d 811 (C.A. 6th); *Klein v. Commissioner*, 154 F. 2d 58 (C.A. 3d), certiorari denied, 328 U. S. 869; *Stockstrom v. Commissioner*, 151 F. 2d 353 (C.A. 8th); *Foerderer v. Commissioner*, 141 F. 2d 53 (C.A. 3d); *Hyman v. Nunan*, 143 F. 2d 425 (C.A. 2d); *Commissioner v. Buck*, 120 F. 2d 775 (C.A. 2d); *George v. Commissioner*, 143 F. 2d 837 (C.A. 8th), certiorari denied, 323 U. S. 778; *Funsten v. Commissioner*, 148 F. 2d 805 (C.A. 8th); and *Miller v. Commissioner*, 147 F. 2d 189 (C.A. 6th).

Moreover, the *Clifford* rule is not confined in its concept of a family group to those members of the family who dwell together under one roof but may include adults in the family living separately and it may also be applied to persons not related to the grantor. See *Cory v. Commissioner*, 159 F. 2d 391, 395 (C.A. 3d), and *Brown v. Commissioner*, *supra*. Furthermore, in applying the *Clifford* rule, it is not necessary to show that the grantor has any motive of tax evasion. *Hyman v. Nunan*, *supra*, p. 428. But it is significant if there is a close connection between the trustees and the grantors or if the grantors are trustees (*Gaylord v. Commissioner*, 153 F. 2d 408, 413 (C.A. 9th)), particularly if the grantors transfer stock or other property to the trust which is connected with the business in which they have a dominant interest or continue to exercise control over such business through the trust. See *Stockstrom v. Commissioner*, 148 F. 2d 491 (C.A. 8th); *Edison v. Commissioner*, 148 F. 2d 810 (C.A. 8th); *Funsten v. Commissioner*, *supra*; *Byerly v. Commissioner*, 154 F. 2d 879 (C.A. 6th); and *Klein v. Commissioner*, 4 T. C. 1195, affirmed, 154 F. 2d 58 (C.A. 3d).

When the trust agreement in the instant case and the facts surrounding it are interpreted in the light of the principles announced in the above cases, it is apparent that the rights and powers, which the taxpayers, a close family group, retained in the property as grantors, as trustees, and as principal beneficiaries, constitute such important incidents of ownership as to compel the conclusion that the taxpayers were the substantial owners of the trust corpus and income. The Tax Court's contrary conclusion is clearly erroneous.

Probably the most important of all the incidents of ownership is the right to benefit financially from the

property and this right the taxpayers had unquestionably retained for themselves individually as grantors. Under Article III (R. 34-35) each grantor had the unqualified right to receive the net income from the stock<sup>3</sup> contributed to corpus by him during his life, and the absolute power by written instrument filed with the trustees to appoint and dispose, to revoke a previous appointment, and to reappoint and dispose, during his life of his share of principal, including the stock dividends here in question, and income of the trust after his death. Thus, each grantor could, without restrictions of any kind, not only give his share of trust property to chosen beneficiaries but could also appoint the corpus to his estate or to his creditors.<sup>4</sup> He is thereby enabled during his life to borrow money or incur debts on the security of an irrevocable appointment to the lender or creditor. The right to have the income for life and to control the disposition of corpus and income after death, rights which each grantor possessed independently of the others, should be given great, if not controlling, weight in considering whether the taxpayers remained the substantial owners of their shares of the trust property, notwithstanding the superimposition of the trust form.<sup>5</sup> See

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<sup>3</sup> Such income does not include the stock dividends involved here, because Article VI (6)(a) of the instrument provides that stock dividends "shall inure to or fall upon principal" (R. 42), and so were retained by the trust when received.

<sup>4</sup> It should be noted that the absolute power of appointment, unlimited in any way, was reserved by each taxpayer, *as trustor*. Thus, in no event could it be limited by Article VIII which imposes upon the "beneficiaries" restrictions against assigning and anticipating their interests.

<sup>5</sup> For estate tax purposes the power of appointment alone held at death would make it necessary for the value of the income after death and of the corpus, including the stock dividends, to be included in the grantor's estate under Section 811 (f) of the Internal Revenue Code, and the reservation of the income for life alone makes the corpus transferred by the grantor includible in the grantor's gross estate under Section 811 (c) of the Code.



*Gaylord v. Commissioner, supra*, p. 413. Cf. *Commissioner v. Buck*, 120 F. 2d 775 (C.A. 2d); *Stockstrom v. Commissioner*, 148 F. 2d 491 (C.A. 8th); *Funsten v. Commissioner*, 148 F. 2d 805, 809 (C.A. 8th).

In *Commissioner v. Buck, supra*, p. 777, the Court of Appeals for the Second Circuit made this significant statement:

Respondent argues, in effect, that the income is nontaxable to him because he has deprived himself of certain of his prior "bundle of rights", i.e. the rights to have the income paid directly to him, to use any of the income or principal for his personal consumption expenditures, and to make a testamentary disposition of the income or corpus. As we read the recent decisions of the Supreme Court, such a diminution of the congeries of rights and privileges called "ownership" is not sufficient to immunize the grantor of a trust from a tax on the income, in a case where, as here (to revert to our enumeration of significant factors), the beneficiaries are members of the donor's family and he has "income in excess of normal needs". In such a case, at any rate, a potent factor which melts off the grantor's insulation from income taxation is the donor's power to dispose of the income, for that power "is the equivalent of ownership of it." *Helvering v. Horst*, (1940) 311 U. S. 112, 118, \* \* \* .

Here the bundle of economic benefits from the property was not diminished to the extent present in the *Buck* case, for, to reiterate, these taxpayers retained the income for their personal use during their lives, they retained the absolute, unrestricted power to dispose of income and corpus after death, and through this power of appointment, they could obtain financial benefits from the corpus during their lives. And these rights, of course, do not stand alone. Added to this are the family relationship of the taxpayers, their unity of

interest in controlling the two corporations, their triple role as trustors, trustees, and beneficiaries, and the other rights and powers reserved under the trust indenture, now to be discussed. Taken all together, these require the conclusion, we believe, that taxpayers remained the substantial owners of the corpus.

The eight grantors were a closely knit family group, composed of a mother, four adult daughters, and three adult sons. Together with Harry Chandler and the estate of a deceased daughter, they owned Chandis, a personal holding corporation, completely, and the grantors, together with Chandis and these same two other members of the family, owned a controlling interest in the Times-Mirror Company (4,022 shares out of a total of 5,760 shares outstanding). (R. 25.)

The eight grantors created a voluntary association among themselves by means of the trust with respect to the Times and Chandis stocks, as they stated in the trust indenture (R. 33) "for their best interests." They stated also (R. 32) that they deemed it for "their best interest" and for the "best interests" of the Times-Mirror Company and Chandis that there be a continuity and stability of policy and management. Their principal purpose, as pointed out by the Tax Court (R. 59), was to insure family control of the Times stock so that Norman Chandler, one of the grantors, would be assured its presidency and general managership. Thus, it is clear that the grantors, in creating the trust, were benefiting their individual interests and that, although they unquestionably gave up some managerial rights held individually over the stocks contributed to the trust, the benefits they were to gain were to them far more important than those surrendered. Otherwise, they of course would not have joined in creating the trust. In this connection it should be noted that each grantor's voice in controlling



each corporation was actually increased by means of the trust. Prior to its formation no one of the grantors owned a majority of the voting stock in either corporation. (R. 25.) The trust enabled each grantor to exchange his right to vote his individual shares for a voice in voting a larger block of shares, which represented controlling interests in each corporation.

Another fact of great significance is that, in addition to being grantors and life beneficiaries, with power to appoint income and principal after death, the taxpayers were also trustees. This triple role quite apparently means that the taxpayers dominated the trust completely and were virtual owners. In filling the three roles, the taxpayers could not and did not act in the disinterested manner that three distinct groups of persons might have done, nor were they required or expected to exercise the usual fiduciary powers of trustee. The instrument empowered them as trustees to construe its terms, their construction to be binding on all beneficiaries. They held the entire legal and equitable title as trustees, the beneficiaries having no title whatever and only the right to receive income as provided in the indenture and the corpus on termination of the trust. Also, individual trustees are authorized to deal with the trustees and to hold any office or position in any corporation with which the trustees may deal. Trustees are empowered to hold trust property in their own names, or in the names of one or more of their number without disclosing the fiduciary relationship. Their discretion was absolute, except where specifically limited, and when exercised conclusive on all persons.<sup>6</sup> These provisions gave taxpayers

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<sup>6</sup> Sec. 2269 of the Civil Code of California (1949), provides:

§ 2269. *Discretionary powers.* A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the proper court if not

as trustees important ownership rights and clearly show that the grantors were not imposing on themselves as trustees the usual fiduciary relationship, but that they were simply entering into a voting trust arrangement for their own benefit while at the same time retaining the essential incidents of ownership, including the financial benefits of the stock. Cf. *Gaylord v. Commissioner*, 153 F. 2d 408, 412 (C.A. 9th); *Edison v. Commissioner*, 148 F. 2d 810, 814 (C.A. 8th); *Stockstrom v. Commissioner*, 148 F. 2d 491, 495 (C.A. 8th).

Moreover, as trustees, they had powers to appoint trustees to fill vacancies in their number, to remove family trustees for cause, and to remove non-family successor trustees at will; to choose and employ agents, depositaries, brokers, attorneys, and others for the trust; to hold trust property in their own names as a group or individually without disclosing the trust; unanimously to increase the capital of, to issue bonds, and to change the voting and other preferences of their stocks in Chandis and Times-Mirror Company. Article VI also gave them numerous other powers, including the powers and discretions of absolute owners in the event the Times and/or Chandis stocks were disposed of, or the companies were wholly or partially liquidated. (R. 39-42.) All of these powers, as was stated in *Stockstrom v. Commissioner*, *supra*, p. 495, have far—

more than a fiduciary significance or value in the nexus of previous ownership, family economics, technical dedication and continued control. This may particularly be true, it would seem, as to powers of control which are beyond those of con-

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reasonably exercised, unless an absolute discretion is clearly conferred by the declaration of trust. [Enacted 1872.]

Thus, it seems clear that no contingent beneficiary, contrary to the Tax Court's view, could have undertaken to control the trustees through any court proceeding. Taxpayers themselves of course as beneficiaries could hardly have questioned their acts as trustees.

ventional fiduciaryship under traditional chancery concepts, and even more so as to powers which, though purporting to be granted also to subsequent trustees, can have no meaning or value actually, except in the settlor's pre-emptive position of dedicator of the property and the hold of the family relations. \* \* \*

To be sure, the powers held as trustees could be exercised by the trustees acting as a group, unanimously or by majority, rather than individually. But in the circumstances here, that is not particularly significant, for as already noted this family group had long been interested in these corporations as the controlling group and had long acted together in business matters relating to them. The fact that they voluntarily pooled their stocks in a voting trust arrangement indicates that their interests were similar and that the benefits they gained from acquiring a voice in controlling the two corporations were far more important than the free voting rights as minority stockholders which they gave up.

Indeed, the direction to themselves as trustees to vote the stocks to carry out their *unanimous* desire to place Norman in the position of president and general manager of the Times-Mirror Company (R. 38) is convincing evidence that their interests were identical,<sup>7</sup>

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<sup>7</sup> The Tax Court's easy assumption (R. 65) that Norman's interest was adverse to that of his co-grantors and co-trustees is not borne out by this provision or by any other evidence. Quite plainly all grantors were agreed, and so stated, that their best interests lay in perpetuating Norman as the executive in charge of the Times-Mirror Company. There is nothing to suggest that this view was not shared by all of them in the taxable years. Even if it were true that conflicting interests were to develop in later years, that could not affect this case for the issue here is simply whether the taxpayers' powers as trustees were so curtailed by the requirement for unanimous or majority agreement that they must not be weighed, along with other facts, in considering the matter of substantial ownership in the taxable years. If adverse interests developed later, of which there is no proof, that is irrelevant.

and that the trust requirement for unanimous (or majority) action of the eight trustees amounted to no real infringement of their control over the stocks. This conclusion is all the more required since the taxpayers, who had the burden of proof, offered no evidence showing or tending to show that their interests were not similar in the taxable years and that they would not vote harmoniously. It was clear error for the Tax Court to assume without proof that the requirement for joint action by the trustees curtailed taxpayers' proprietary rights to such an extent in the taxable years that they can no longer be regarded as substantial owners, when the inference required by the record is the contrary and when they retained the financial benefits from the property. See footnote 7, *supra*.

The Tax Court indicated that the taxpayers as trustees are "independent". (R. 60.) But surely they are not "independent" of themselves as trustors and as present beneficiaries, indeed the only beneficiaries with vested indefeasible interests. They plainly are not independent in the sense that the trustees in the usual non-family trust are, or that even family trustees who fill a real fiduciary position are. The Tax Court also stated (R. 62) that the trustees' powers "are fiduciary powers which must be exercised in good faith for the benefit of the beneficiaries and not for the personal benefit or aggrandizement of the trustors". But one must ask, for what beneficiaries? Apparently the Tax Court's answer was for the contingent beneficiaries, but the proper answer must be, for the grantors as the beneficiaries entitled to receive trust income for life with power to appoint the income and corpus after death to their estates or other appointees of their choice. The contingent beneficiaries had no

vested rights, since their right to take was dependent on each grantor's failing to exercise his power to appoint. The Tax Court could not properly ignore the grantors as principal and present beneficiaries, nor could it properly conclude that the grantors could not, and did not, act in their own interests when playing their roles as trustees. Moreover, as already pointed out, *supra*, many of the trustees' powers were of a nature indicating that the trustees were not intended really to be fiduciaries, the exercise of their discretionary powers was not controllable under California law (fn. 6, *supra*), and as a practical matter the trustees' acts would hardly be questioned by themselves as beneficiaries.

A further important power reserved by the taxpayers as grantors is by unanimous agreement "to modify, amend, construe, define or otherwise vary the terms of the provisions of Articles II, III, V, VI, VII, and IX" except that no modification is to be effective, directly or indirectly, "to change the provisions as to the duration of this trust or the initial character of the Trust Estate, as provided in Articles I, IV, and VIII." (R. 47.) Under this power the grantors acting in unison could change the contingent beneficiaries named in Article III to receive corpus and income in the event they did not exercise their powers of appointment; they could change the methods of appointing and removing trustees set out in Article V; they could enlarge or alter their powers as trustees under Article VI; and they could further limit their liabilities as trustees under Article VII. Their full right to do these things seems unquestionable so long as they did not change the duration of the trust or the *initial* character of the trust estate. And we believe it plain that, under the reserved right to amend Article



VI, the grantors could actually provide that the stock dividends here in question are income distributable to them as life beneficiaries. Cf. Paragraph (f)(6) of Article VI. (R. 42-43.) The power to take the stock dividends of course is virtually the same as ownership, as this Court recognized in *Gaylord v. Commissioner, supra*.

The Tax Court thought (R. 63) that the power to amend and take down the stock dividends did not exist, in part because they were a part of the shares of stock within the meaning of Article I which was not subject to amendment. This view is not supportable. The stock dividends were not shares "delivered to the Trustees hereunder" within Article I (R. 33), since that reference is to the particular shares delivered to the trustees on formation of the trust, which comprise the trust estate. The shares meant in Article I are enumerated just prior to that article in the trust indenture (Ex. 1-A), and they do not include subsequent stock dividends. Obviously, the stock dividends were not part of the initial trust estate and to distribute them would not change its initial character or terminate the trust. The Tax Court also stated (R. 63) that the grantors' powers could "be exercised only to maintain such a proportionate interest as is now represented in" the Times and Chandis companies. But it failed to note that the quoted language is found in Article VI (2) (R. 37-38) of the trust instrument and that it follows and apparently relates only to powers granted to the trustees to borrow upon, pledge, or otherwise dispose of any interest in the "said" Times and Chandis shares, i.e., those shares contributed to the trust initially. Thus, the proportionate interest requirement was not intended apparently to relate to any stock other than the initial stock or to limit the grantors in exercising

their reserved power to amend.<sup>8</sup> In any case even if applicable to the grantors' reserved power to amend, the proportionate interest requirement is found in Article VI, which was subject to the power to amend. Since it could be eliminated or amended, it constitutes no restriction on the grantors' rights by amendment to take down the stock dividends.

In enumerating the things which an individual grantor could not do with respect to his stock after creation of the trust (R. 60-61), the Tax Court makes many obvious errors. For example, a trustor can, contrary to the Tax Court's statement, receive cash dividends on the Chandis stock, since these constitute trust income under Article VI (6) (a) which the trustor is entitled to receive. The statement (R. 61) that a trustor is not entitled to "sprinkle" trust income during his lifetime, as in *Commissioner v. Buck*, 120 F. 2d 775 (C.A. 2d), is inaccurate; it overlooks the fact that each trustor here is entitled to receive all trust income from his property and, having received it, could sprinkle it as he wished. Furthermore, the Tax Court fails to observe that each trustor reserved the absolute power to sprinkle both income and corpus after his death as he desired, even to his own estate. This case is much stronger for taxability than was the *Buck* case where Buck only controlled the sprinkling of the income among others but could not receive it himself. The statement that a trustor had no right, individually or as trustee, to hold trust assets without disclosing the trust (R. 61) is in violation of Article VI (6) (b),

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<sup>8</sup> In fact, the taxpayers acting either as trustees or grantors had already changed the original proportion of stock ownership in Chandis before any stock dividend was received. (R. 48.) The trust in 1937 had acquired in some manner 884 shares of Chandis preferred stock (R. 47), representing 1,263 votes (R. 63), and this of course destroyed the trust's original proportionate interest in Chandis.



expressly giving the trustees power to hold trust property in the names of one or more of their number without disclosing the fiduciary relationship. Other errors could be pointed out. In addition, throughout the whole statement, the Tax Court fails to allow for the individual grantor's position as a member of a close family unit having the same interests and acting together in the taxable years, as a result of which the grantor actually held the power as one of the grantors and trustees to do most of the things mentioned by the Tax Court. The *Clifford* case and those following it, heretofore cited, recognize that the actualities are to govern in determining the question of substantial ownership, and in the harmonious family unit here there was little practical difference in powers exercisable by the eight trustees together and similar powers exercisable by a single grantor-trustee. This view is supported by the dissenting opinion in the Tax Court (R. 70), which obviously and correctly regarded the power of the trustors to modify Article VI (including the power, as shown above, to treat the stock dividends as income distributable to them), as an effective power in each trustor to do so.

*Commissioner v. Bateman*, 127 F. 2d 266 (C.A. 1st), which the majority of the Tax Court thought apposite here (R. 59-60), is we submit clearly distinguishable. In that case the taxpayer-grantor created a trust in contemplation of her intended marriage. Ninety-five percent of the income was distributable during the grantor's lifetime, \$3,000 annually to the intended husband and the balance to the grantor. The remaining five percent of the income was to be added to corpus over which (except for \$50,000 which was distributable to the husband if he survived the grantor) the grantor reserved a general power of appointment to take effect at her death, with gifts over in default

of appointment. The husband had died before the taxable year there involved. The Court of Appeals for the First Circuit held that the grantor was not taxable on the five percent of income added to corpus under Section 22 (a) (pp. 269-275) but stated (p. 275) :

We reach this conclusion not without some misgivings, in view of the uncertainty as to the proper implications to be drawn from the decisions we have reviewed.

We think that there is considerable doubt, which was shared by the court itself, that the court there reached the correct conclusion but in any event the *Bateman* case did not involve the same factual situation as does the present case and consequently, if it is assumed to be correct, it does not dictate the same conclusion in this case. In the *Bateman* case, the trust corpus was transferred to two independent and disinterested third-party trustees who were given full powers of management and control, including the right to vote the trust stocks, and power to select their successors or co-trustees. They were in Massachusetts, while the grantor lived in England during the taxable years. And Lady Bateman was not able, as are the grantors here, to take down the income added to corpus by amending the trust instrument to make it income distributable to her as income beneficiary. Nor did the corpus of the trust consist of stocks in corporations which the grantor controlled, as here. In short, the *Bateman* case presented the issue of whether the reservation of the income for life with power to appoint corpus after death, without more, amounted to such substantial ownership as to make the grantor taxable on the income under Section 22 (a). The instant case possesses so many additional factors, pointing to substantial ownership, that it can not be governed by the *Bateman* decision.

As the four dissenting judges pointed out (R. 70), the present case is more analogous to *Klein v. Commissioner*, 4 T.C. 1195, affirmed *per curiam*, 154 F. 2d 58 (C.A. 3d), certiorari denied, 328 U. S. 869. Klein did not reserve the right to receive the trust income as here. Instead the income was to be accumulated for twenty years or until the death of Klein or his wife. At the end of the accumulation period if Klein was alive, the income was payable to his wife or to such persons as Klein should select. Klein also reserved the power to designate the persons to take the corpus upon termination of the trust at his death or that of his wife. He was one of the two co-trustees, with broad administrative powers over the property. He had power to remove his co-trustee, who was a close business associate, and he dominated the corporation whose stock composed the trust corpus. Thus, that case has many points of similarity to the case at bar and the decision there that Klein was taxable under Section 22 (a) on the income added to corpus is pertinent in this case.

It is submitted that the Tax Court clearly erred in not finding that taxpayers' bundle of rights in the trust corpus and income was so substantial as to require the conclusion that they remained the real owners thereof and are taxable on the stock dividends under Section 22 (a).

## II

**The Tax Court Erred in Not Holding That the Grantors of the Trust Here Are Subject to Tax under Section 167 of the Revenue Act of 1938 and the Internal Revenue Code, on the Stock Dividends Received by the Trust During the Taxable Years**

The Tax Court also held that the stock dividends (which are admittedly taxable income in the years received) were not taxable to the grantors under Sec-

tion 167 of the Revenue Act of 1938 and the Internal Revenue Code, Appendix, *infra*. (R. 66.) That section requires the grantor of a trust to treat any part of the trust income as his own for income tax purposes where such part of the income—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; \* \* \*

We think it clear that this section requires the taxation of the stock dividends to the grantors because the stock dividends are trust income which may, in the discretion of the grantor or persons not having a substantial adverse interest in the disposition of the stock dividends, be distributed or be held for future distribution to the grantor.

1. The power reserved by the eight grantors to amend the trust as to certain articles, including that providing that stock dividends inure to corpus, as already shown under point I, enabled the grantors to provide that the stock dividends are income with the result that they would become distributable to the grantors under Article III. Thus, the stock dividends may in their own discretion be distributed to the grantors or may be held for future distribution to them. The fact that the eight grantors must unanimously agree to amend and make the dividends distributable to them has no significance at all for purposes of Section 167, because the section in terms refers only to persons not having a substantial adverse interest in the disposi-

tion of the income. Since each grantor held the right to receive his share of trust income and had complete and exclusive control over the disposition of his share of the trust corpus, including the stock dividends, through his absolute power to appoint, no other grantor could possibly be regarded as having an adverse interest in the disposition of the dividends, whether their status be corpus or income. There was no possibility that any grantor could have an interest in any other grantor's share of corpus as a contingent beneficiary under the gifts-over in default of appointment. (R. 35.) No grantor could qualify as a *living* heir-at-law at the termination of the trust, since the trust would not terminate until the last survivor of 21 named persons, including all eight grantors, had died. (R. 35.) Even if the condition that only living heirs-at-law are possible beneficiaries could be met, there were other contingencies (i.e., the non-exercise of the power of disposition, the prior death of all issue of the grantor, and their classification as an heir-at-law under California law in force on the date of the grantor's death), to be met before any grantor could qualify as a beneficiary of any other grantor's corpus, and such a remote contingent interest could not be considered as substantial. Cf. *Cushing v. Commissioner*, 38 B.T.A. 948.

2. The power to appoint the corpus, including the stock dividends, also requires the conclusion that the dividends may be distributed or may be held for future distribution to each grantor in his discretion. Since each grantor held this power alone, there is no question here as to whether the interests of the other grantors are substantially adverse. Under the absolute power to appoint, as already shown, the grantor could name his estate or his creditors to receive the corpus, including the stock dividends, on termination of this trust



after his death, and because of his power to do this he would be enabled to realize the value of the dividends during his lifetime.

In *Commissioner v. Bateman*, 127 F. 2d 266 (C.A. 1st), the court rejected the view that income added to the corpus which was subject to the grantor's general power of appointment effective at her death was not income which could be distributed to the "grantor" within the meaning of Section 167, citing *Wilson v. Commissioner*, 42 B.T.A. 1260. In the *Wilson* case, the Board held (pp. 1265-1266) that for purposes of Section 167 "future distribution to the grantor" did not include a remote possibility of future distribution to the grantor and did not include future distribution "to his estate". The *Wilson* decision was reversed in *Commissioner v. Wilson*, 125 F. 2d 307, 310-311 (C.A. 7th), apparently for the reason that there was a possibility of future distribution to the grantor during his life but if this did not occur his estate would get the income in question in any event. Thus, the Seventh Circuit's decision to some extent supports the view that future distribution to the estate of a grantor will satisfy Section 167.

However, our position does not depend on a possible reversion to the grantor's estate dependent on circumstances beyond his control as in the *Wilson* case. Here the grantor could, by appointing his estate to receive the corpus, control its use for payment of his obligations, the benefits from the creation of which he could enjoy during his lifetime. Thus, we think the *Bateman* opinion erroneously treated that case as completely analogous to the *Wilson* situation, and that in any event it failed to consider the realities which exist in the case of a general power to appoint corpus, including income added thereto, to take effect at death, by means of which the grantor may be able to enjoy

the equivalent of the income during his life. Moreover, if such income is not regarded as taxable under Section 167 merely because it can not be appointed to the grantor personally but only to his estate, the way is open for a grantor with a general power to escape tax and at the same time to enjoy the economic benefit of the accumulated income during his life on the strength of his appointment of the income to his estate. We think the terms of Section 167 are not to be so easily avoided.

It is submitted that the Tax Court erred in failing to hold that the stock dividends are taxable to the taxpayer-grantors under Section 167.

#### CONCLUSION

The decision of the Tax Court should be reversed.

Respectfully submitted,

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SEPTEMBER, 1950.



## APPENDIX

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. \* \* \*

\* \* \* \* \*

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (o), relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question".

The corresponding sections of the Internal Revenue Code contain substantially the same provisions as those above.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

\* \* \* \* \*

ART. 167-1. *Trusts in the income of which the grantor retains an interest.*—(a) *Scope.*—Section 167 prescribes that the income, or any part of the income, of certain trusts shall be taxed to the grantor, not because the grantor has retained a certain interest in the *corpus* of the trust (as in section 166), but because of his retention of a certain interest in the *income* of the trust. This article deals with the taxation of such income. The term "income," as used in this article, means any part or the whole of the income of the trust.

(b) *Test of taxability to the grantor.*—The test prescribed by the Act as to the sufficiency of the grantor's retained interest in the trust income, resulting in the taxation of such income to the grantor, is whether he has failed to divest himself, permanently and definitively, of every right which might, by any possibility, enable him to have such income, at some time, distributed to him either actually or constructively. Such a distribution to the grantor occurs within the meaning of section 167 if the income is paid to him or to another in obedience to his direction or if the income is

applied in payment of premiums upon policies of insurance on the grantor's life.

For the purposes of this article, the sufficiency of the grantor's retained interest in the income is not affected by the fact that the grantor has provided that the right to so effect or direct the distribution of income is, or may at some future time be, vested in any person (either alone or in conjunction with the grantor) not having a substantial interest in the income adverse to the grantor. A bare legal interest, such as that of a trustee, is never substantial and never adverse.

If the grantor has retained any such interest in the income, such income is taxable to the grantor regardless of—

(1) whether it may be distributed currently or accumulated for future distribution;

(2) whether such distribution, either current or subject to accumulation, is fixed by the trust instrument or is dependent on an exercise of discretion;

(3) whether, if such distribution is in any way effected by or dependent on an exercise of discretion, the person exercising the discretion is the grantor or a person not having a substantial interest in the income adverse to the grantor, or both;

(4) the time or times of such distribution, whether within or without the taxable period, whether conditioned on the precedent giving of notice, or on the elapsing of an interval of time, or on the happening of a specified event, or otherwise;

(5) when the trust was created.

Thus the inclusion of any trust within the scope of section 167 is based on the fact that the grantor has retained an interest in the income therefrom by which he is, or may be enabled at some time, to receive its benefits. But the provisions of sec-

tion 167 are not to be regarded as excluding from taxation to the grantor the income of other trusts, not specified therein, in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the trust income. If, for example, trust income is applied in satisfaction of the grantor's legal obligation whether to pay a debt, to support dependents, to pay alimony, to furnish maintenance and support, or otherwise, such income is in all cases taxable to the grantor.

If the grantor strips himself permanently and definitely of every such interest retained by him, the income of the trust realized after such divesting takes effect is not taxable to the grantor but is taxable as provided in sections 161 and 162.

A person may have an interest that is both substantial and adverse to the grantor in the disposition of only part of the income. There is to be excluded in computing the net income of the grantor only that part of the trust income in the disposition of which such person has a substantial interest adverse to the grantor.

\* \* \* \* \*

The above provisions of Regulations 101 are substantially the same as Section 19.167-1 of Regulations 103.



# United States Court of Appeals

FOR THE NINTH CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

MAY CHANDLER GOODAN,

*vs.*

*Respondent.*

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COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

MARIAN OTIS CHANDLER,

*vs.*

*Respondent.*

---

COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

NORMAN CHANDLER,

*vs.*

*Respondent.*

---

COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

PHILIP CHANDLER,

*vs.*

*Respondent.*

---

COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

CONSTANCE CHANDLER CROWE,

*vs.*

*Respondent.*

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COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

HELEN CHANDLER GARLAND,

*vs.*

*Respondent.*

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COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

RUTH C. WILLIAMSON,

*vs.*

*Respondent.*

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## BRIEF FOR THE RESPONDENTS.

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**FILED**

**OCT 20 1950**

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No. 12550  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

MAY CHANDLER GOODAN,

*vs.*

*Respondent.*

---

COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

MARIAN OTIS CHANDLER,

*vs.*

*Respondent.*

---

COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

NORMAN CHANDLER,

*vs.*

*Respondent.*

---

COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

PHILIP CHANDLER,

*vs.*

*Respondent.*

---

COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

CONSTANCE CHANDLER CROWE,

*vs.*

*Respondent.*

---

COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

HELEN CHANDLER GARLAND,

*vs.*

*Respondent.*

---

COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

RUTH C. WILLIAMSON,

*vs.*

*Respondent.*

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**BRIEF FOR THE RESPONDENTS.**

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**Opinion Below.**

The opinion of the Tax Court [R. 29-70] is reported at  
12 T. C. 817.

## Jurisdiction.

A notice of deficiency was mailed by the Commissioner of Internal Revenue to each of the respondents on June 30, 1943, proposing deficiencies in individual income taxes for the calendar years 1938, 1939, 1940, and 1941. [R. 8-16, 92-101, 116-127, 142-154, 171-179, 195-203, and 219-228.] A petition to the Tax Court of the United States was filed by each respondent on September 27, 1943, pursuant to and within the 90-day period prescribed by Section 272(a) of the Revenue Act of 1938 and Section 272(a) of the Internal Revenue Code. [R. 2-16, 86-101, 110-127, 136-154, 163-179, 189-203, and 212-228.] Issue was joined by the filing of the Commissioner's answers on November 17, 1943. [R. 17-19, 102-104, 128-130, 154-157, 180-184, 204-206, and 228-231.]

The Tax Court's opinion (12 T. C. 817) was promulgated May 17, 1949 [R. 29-70], and on May 24, 1949, a decision was entered in each proceeding. On June 7, 1949, the Commissioner of Internal Revenue filed a motion to vacate said decisions [R. 71-73], and said decisions were vacated by order of the Tax Court dated August 15, 1949 [R. 74]. On November 30, 1949, the Tax Court entered an order denying the Commissioner's motion to reconsider and set aside the findings of fact and opinion, together with a memorandum explaining its reasons for the denial [R. 75-80], and on the same day, November 30, 1949, it entered a decision in each case in conformity with the decision theretofore vacated [R. 81, 105, 131, 157-158, 184, 207,

and 232].\* Petitions for review of said decisions were filed by the Commissioner of Internal Revenue on February 17, 1950 [R. 82-83, 106-107, 132-133, 158-160, 185-186, 208-209, and 233-234], pursuant to Section 1141 of the Internal Revenue Code and within the 3-months' period specified in Section 1142 of the Internal Revenue Code. The respondents' tax returns for the years in question were filed with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles, California. [R. 2 and 17, 86 and 102, 110 and 128, 136 and 154, 163 and 180, 189 and 204, and 212 and 229.]

### Statutes and Regulations Involved.

The pertinent provisions of the applicable statutes and Regulations involved are set forth in the Appendix.

### Questions Presented.

1. Whether the Tax Court's determination that certain stock dividends were required to be retained as corpus of a trust and could not be distributed to the respondents as beneficiaries of the trust was an erroneous interpretation of the Trust Agreement.
2. Whether the Tax Court was correct in its determination that the trust as a separate entity should be respected for tax purposes and that the individual respondents, there-

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\*As stated on page 2 of the Commissioner's brief, the record prints some of the decisions entered on May 24, 1949, and others entered on November 30, 1949. Decisions were entered in each case on both dates, but the decision entered in each case on November 30, 1949, was identical to the decision in that case entered on May 24, 1949.



fore, should not be subjected to income tax upon stock dividends which they did not and could never individually receive.

### Statement.

The Commissioner's statement of the case, consisting largely of a digest of the Trust Agreement, is a repetition of the facts as found by the Tax Court, which in turn were based upon the facts as stipulated by the parties. Inasmuch as the respondents do not controvert any of those facts, we shall not repeat them here. We desire, however, to state briefly the background giving rise to the present problem.

Chandis Securities Company was organized in 1916. [R. 25.] It fell within the definition of a personal holding company under the subsequently-enacted personal holding company surtax provisions of the revenue laws, which levy a special surtax upon income of a personal holding company that is not distributed to its stockholders. Under the Revenue Act of 1936 the tax on such undistributed earnings was not prohibitive, amounting to only 18% of the undistributed income up to \$100,000.00 in any one year. See Section 351(a)(2) of the Revenue Act of 1936. The rate was drastically increased by the Revenue Act of 1937, applicable to years beginning in 1937, so that the first \$2,000.00 of undistributed income was taxed at the rate of 65% and all undistributed income in excess of \$2,000.00 was taxed at 75%. See Section 1 of the Revenue Act of 1937. And those high rates remained in effect under Section 401 of the Revenue Act of 1938.

Chandis Securities Company was indebted to a bank in a very substantial amount on its own obligations and obligations of its wholly-owned subsidiary, the Southwest Land Company. [R. 50.] By reason of the terrific increase in personal holding company surtax rates in 1937, the company was placed in a dilemma. For practical purposes it became impossible for the company to retain its earnings for the liquidation of its obligations and those of its wholly-owned subsidiary, for three-fourths of any earnings thus retained would be taken by the Government in taxes and only 25% would be left with which to liquidate the indebtedness.

The purpose of the personal holding company tax, of course, was to force personal holding companies to distribute their earnings so that tax on the dividends would be collected from the stockholders.

The Chandis Securities Company met this problem in what seemed to be the only practicable way under the statute. It had outstanding only common stock. By authorizing the issuance of new preferred stock and distributing such preferred stock to the holders of the common stock, a taxable stock dividend would result. This would satisfy the purposes of the personal holding company surtax, in that ordinary dividend tax would be paid by the stockholders upon the earnings of the company, but at the same time the corporation would be permitted to retain a portion of the cash earnings represented by the preferred stock and could apply such cash earnings toward the payment of the obligations mentioned.

This course was adopted. During each of the years 1937, 1938, 1939, 1940, and 1941 a portion of the earnings of Chandis Securities Company was distributed as cash dividends, while such earnings as were needed to pay the obligations referred to were retained by the company and an equivalent amount of preferred stock was distributed on the common stock. [R. 50.] Although it does not appear in the record, the obligations have now long since been discharged and the consequent necessity of retaining cash earnings through distribution of taxable preferred stock dividends has been eliminated.

That this method of retaining cash needed by a corporation in its business or to pay debts was wholly legitimate and sanctioned by Congress and the Courts is reflected in the following quotation from *Hekvering v. Griffiths*, 318 U. S. 371:

“On March 3, 1936, the President had suggested the enactment of a tax upon the undistributed income of corporations. \* \* \*

\* \* \* \* \*

“At the hearings of the Congressional Committees the proposed tax was attacked as being a measure which would have the effect of forcing the distribution by corporations of assets needed in their business. Its supporters anticipated the decision of this Court in the Koshland Case and countered with statements that dividends taxable as income to the shareholders—which would have the effect of avoiding the undistributed profits tax on the corporation—could be declared and the undistributed profits tax avoided without the necessity of distributing assets. \* \* \*”

The controversy in the present cases arises because 35,394 of the outstanding 38,288 shares of common stock of Chandis Securities Company were owned and held by the Chandler Trust No. 2, which had been created on June 26, 1935. The preferred stock distributed on the common shares held by the trust were issued in the names of and delivered to the trustees; and since the Trust Agreement contained the rather common provision that stock dividends should inure to or fall upon principal such preferred stock was added to corpus of the trust and has been so held to this date. The trust reported the stock dividends as taxable income which was not distributed or distributable to the beneficiaries and hence the trust itself paid substantial income taxes on such income. [R. 47-50.]

The Commissioner of Internal Revenue sought to tax such stock dividends to the eight individuals who created the trust, seven of whom are the respondents here, upon the grounds (1) that they could amend the Trust Agreement in such a way as to permit the distribution of the stock dividends to themselves individually (hence subjecting them to tax under Section 167 of the Revenue Act of 1938 and of the Internal Revenue Code), or (2) that the existence of the trust should be ignored for tax purposes and the individual grantors should be treated as the owners of the trust corpus under Section 22(a) of the Revenue Act of 1938 and of the Internal Revenue Code within the doctrine of *Helvering v. Clifford*, 309 U. S. 331.

The Tax Court, however, held that the Trust Agreement forbids any amendment that would permit distribution of

the stock dividends and hence Section 167 is not applicable. This interpretation of the Trust Agreement is the one the taxpayers, parties to the agreement, have always maintained as reflecting their intent. But we have the curious situation here of an outside party—the Commissioner of Internal Revenue—arguing before this Court that such interpretation of the instrument is erroneous; that the taxpayers possess a power they never have thought they possessed, a power they never intended to possess, a power they do not want, and a power the exercise of which would go a long way toward nullifying the very purpose they intended to accomplish by creation of the trust. The taxpayers maintain that the Tax Court's interpretation of the Trust Agreement was correct and should be affirmed by this Court.

With respect to Section 22(a), the Tax Court held that the trust was established for a legitimate business purpose, with no thought whatever of reducing income taxes; that each individual grantor executed the Trust Agreement for the very purpose of surrendering important and substantial attributes of ownership theretofore enjoyed by him as owner of his shares; that he did not in substance or in fact remain the owner of his share of the trust corpus; and hence it would be improper to tax him upon the stock dividends as if the trust had not been created. The taxpayers contend that these conclusions were eminently sound and should be affirmed by this Court.

### Summary of Argument.

1. Eight individuals, of whom seven are the respondents here, owned certain shares of stock of The Times-Mirror Company and Chandis Securities Company. They created a trust in 1935 and each contributed his shares of such stock as corpus of the trust. The trust is irrevocable and is to terminate only upon the death of the last survivor of the grantors and their children who were living upon creation of the trust—21 individuals in all, ranging in age from two months up to 68 years. The principal purpose of the trust was to hold and conserve the shares of stock until termination of the trust. No amendment of the trust could be effective, directly or indirectly, to change the initial character of the trust estate or the duration of the trust. Stock dividends were required to be added to corpus of the trust. The Tax Court correctly held that stock dividends received by the trust could never be distributed to the grantors of the trust and hence such stock dividends were taxable to the trust and not to the grantors under Section 167 of the Revenue Act of 1938 and the Internal Revenue Code. The Tax Court also correctly held that Section 167 does not apply by virtue of a power to appoint the corpus, including accumulated stock dividends, after the death of a grantor.

2. The trust involved here was created for purposes diametrically opposed to those for which trusts are created under the doctrine of *Helvering v. Clifford*, 309 U. S. 331. Each grantor intended, by creation of the trust, to surrender, and did surrender, his absolute ownership of his

shares of stock for a wholly legitimate business purpose, as the Tax Court held, and with no thought whatever of savings in income taxes or estate taxes. The trust was not created, as is the usual *Clifford*-type trust, in an effort to create two or more taxable units where there is in substance but one economic unit, retaining as much dominion and control as possible and still effect a savings in surtax. The stock dividends in question did not remain for distribution within an intimate family group consisting of one economic unit, but are dedicated to be held for decades as corpus of a trust, for as long a term as is permitted by the laws of California. The Tax Court correctly appraised the realities of the situation in holding that each of the eight trustees was independent of the others and in deciding that the existence of the trust should not be ignored for tax purposes. Its decision that each grantor did not remain in substance the owner of his contribution to the trust corpus should be affirmed.

3. In the alternative, the respondents would not be taxable upon the stock dividends under the Commissioner's regulations subsequently adopted, and they are entitled to the benefit of his announced policy not to tax grantors of trusts for earlier years if they would not be taxable in subsequent years under the regulations.



## ARGUMENT.

### I.

**The Tax Court Correctly Interpreted the Trust Agreement as Forbidding Distribution of the Stock Dividends to the Individual Respondents, and Correctly Held That Section 167 of the Revenue Act of 1938 and the Internal Revenue Code Does Not Apply.**

The Commissioner's argument that the grantors should be taxed under Section 167 of the Revenue Act of 1938 and of the Internal Revenue Code is his second argument, on pages 37 to 41 of his brief. Logically, however, we feel that this matter should be decided first, for the alleged power to have the stock dividends distributed to the grantors is also one of the factors the Commissioner stresses in attempting to apply Section 22(a) of the Revenue Act of 1938 and of the Internal Revenue Code. See pages 32-34 of his brief. Hence, we prefer to answer this contention first.

The provision of the Trust Agreement which requires that stock dividends shall "inure to or fall upon principal" appears in Article VI(6)(a). Article IX of the agreement, after specifying that the trust shall be irrevocable, provides that the trustors during their joint lives can by their unanimous agreement in writing amend or modify the provisions of Articles II, III, V, VI, VII, and IX. Hence, the Commissioner reasons, the trustors by unanimous agreement can amend Article VI to provide that stock dividends should be deemed to be income, not to be added to corpus but distributable to the present beneficiaries. Hence, he argues that within the meaning of Section

167 the stock dividends may be distributed to the grantors or are held or accumulated for future distribution to the grantors.

But Article IX, after granting the power to amend by unanimous agreement, follows immediately with this limitation:

“\* \* \* but no such modification shall be effective, directly or indirectly, to change the provisions as to the duration of this trust or the initial character of the Trust Estate, as provided in Articles I, IV, and VIII, the provisions of which last numbered Articles shall in all respects and in each and every provision thereof be and remain irrevocable.”

Hence, no modification of any Article in the Trust Agreement can be effective, directly or indirectly, to change the “initial character” of the trust estate.

What is the “initial character” of the trust estate? The introductory clause of the Trust Agreement recites that the trustors desire to unite and vest in the trustees “the *interests* of each of the trustors in said corporations,” and that there should be “held, conserved, administered and eventually distributed, \* \* \* those *assets* which are respectively contributed by them to the Trust Estate.” It also recites that the trustors have delivered and assigned to the trustees certain *certificates representing shares* of the capital stock of the two corporations, and that *said personal property* shall be deemed to be the trust estate. Following such introductory provisions, Article I specifies that the trust estate shall be deemed to be segregated into two parts, one part consisting “of all of the *shares* of the capital stock of the Times-Mirror Company delivered to the Trustees hereunder” and the other consisting “of all

of the *shares* of the capital stock of Chandis Securities Company delivered to the Trustees hereunder."

In other words, the "initial character" of the trust estate consisted of shares of stock—to wit, 35,394 shares of the outstanding 38,288 shares of common stock of Chandis Securities Company, and 350 shares of the outstanding 5,760 shares of stock of the Times-Mirror Company.

The Commissioner, by confusing "certificates" with "shares," argues in effect that the initial character of the trust estate consisted only of the particular *certificates* that were delivered by the grantors to the trustees, and that no matter how much the *shares* represented by those *certificates* might be diluted with stock dividends the initial character of the trust estate would not be changed so long as the original *certificates* remained on hand with the trustees. Thus, on page 33 of his brief the gist of the Commissioner's argument is found in the following sentence:

"Obviously, the stock dividends were not part of the initial trust estate and to distribute them would not change its initial character or terminate the trust.

\* \* \*

Here we have exposed the fallacy in the Commissioner's position. Suppose either corporation desired to split up its stock into smaller units and accomplished this result by distributing stock dividends of say 10 new shares on every outstanding share of stock, or even 100 shares for one. The Commissioner's position is that the grantors could amend the trust and take unto themselves the 10 shares or the 100 shares for every share held by the trust, and that this would not change the "initial character" of the trust estate. Such a procedure obviously would reduce the share

in the corporation represented by the certificates delivered to the trustees to merely 10% or 1% of the share represented by those certificates before such a distribution. Instead of owning roughly 35,000 out of 38,000 shares, if the Commissioner's position is correct the trust would own only 35,000 out of 380,000 shares or even 3,800,000 shares. For the Commissioner to contend that this would not change the initial character of the trust estate is absurd. The "initial character" of the trust estate obviously has reference to the substantive shares contributed to the trust and not merely the paper evidence or certificates representing those shares.

Fletcher's Cyclopaedia Corporations, Volume 11, Chapter 58, Section 5083, page 28, draws the distinction between shares of stock and certificates as follows:

"A share of stock is one of the proportionate integers or units of the capital stock, and is the interest or right which the owner or holder thereof has in the management of the corporation and to share in the profits thereof and in the property and assets thereof on dissolution, after the payment of the corporate debts and obligations."

And Section 5092, pages 55-56:

"It is well settled that a certificate of stock in a corporation is not the stock itself. It is the mere evidence of the holder's ownership of the stock and of his rights as a stockholder to the extent specified therein \* \* \*."

The following quotations from Scott on Trusts, Volume 2, are sufficient to indicate that distribution of the stock dividends would change the initial character of the trust

estate. Thus, he states in Section 231.2, pages 1251 and 1252:

“§231.2. Stock dividends. Where a trustee is authorized to retain certain shares of stock but is not authorized to purchase similar shares, and the corporation issues further shares to the shareholders as a stock dividend, the trustee can retain the new shares. In such a case he is not investing trust funds in the purchase of the shares, *but is merely maintaining the proportionate interest of the trust in the corporate undertaking.*” (Emphasis added.)

And in Section 236.3, page 1305, in discussing whether, in the absence of specification in the trust instrument, stock dividends should be treated as income or principal, the following comment appears:

“One objection to allocating the whole or a part of a stock dividend to income is that even though there is no impairment of the value of the principal of the trust at the time of its creation, yet the proportionate interest of the trust estate in the corporation is diminished. \* \* \*”

The same principle has been established by decisions of the United States Supreme Court. In *Gibbons v. Mahon*, 136 U. S. 549, 10 S. Ct. 1057, 34 L. Ed. 525, the Court said:

“A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares, and the proportional

interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones.”

Hence, the Tax Court in the present cases was eminently sound when it concluded as follows [R. 63-64]:

“\* \* \* Reference to Exhibit 2-B attached to the stipulated facts shows that the preferred stock carried voting rights of one and three-sevenths votes for each share of preferred, as compared to one vote for each share of common. Any amendment by the trustors as a group that distributed the preferred stock would, therefore, destroy the proportionate interest that the trust had in Chandis. Such an amendment would change the initial character of the trust and would exceed the limited power of modification reserved by the trustors.”

The Tax Court went further and advanced two additional reasons why the stock dividends could not be distributed to the grantors within the meaning of Section 167. It stated as follows [R. 64]:

“Another reason which makes any joint action by the trustors on the above amendment unlikely is the adverse interest of Norman Chandler. His personal interests would undoubtedly lead him to object to any modification that would hurt his chances to assume the presidency of The Times. Without his consent the other trustors would be powerless to modify the trust instrument in any particular.

“A third deterring factor in making any such amendment is the rights of the remaindermen. As hereinabove pointed out, California law would not

permit the trustors to terminate the trust upon the theory that they were the only interested parties. If the trustors could amend so as to distribute a part of the trust corpus, they could amend so as to distribute the entire corpus and thus terminate the trust. The law will not permit the trustors to accomplish by indirection that which they can not do directly. We are of the opinion that any remainderman could, by proper court action, prevent the trustors from distributing the corpus to the life tenants. \* \* \*

In other words, the Tax Court correctly held that Norman Chandler, whose consent was necessary to any modification of the trust, would be adverse to an amendment which would permit the voting power of the stock held in the trust to be diluted. The Commissioner's brief, in a footnote on page 30, denies that Norman's interest would be adverse. But the Commissioner apparently misses the point. All he says is that if adverse interests were to develop later among the grantors that would be irrelevant. But the question is not whether a conflict might develop between the grantors. The question is, if one of the grantors should suggest that the trust be amended in such a way that stock dividends might be distributed to them, would such a proposal be contrary to Norman Chandler's personal interests? We maintain that the Tax Court correctly appraised the situation in holding that Norman Chandler, who was assured of lifetime occupancy of the presidency of the Times-Mirror Company under the trust as it was initially created, would be substantially adverse to an amendment which would dilute the voting power of the trust and which might thereby jeopardize his position.

The third reason, as expressed by the Tax Court in the above quotation, brings up another interesting point. One



of the principal contentions of the Commissioner before the Tax Court was that Chandler Trust No. 2 was not a valid trust, since no one had an interest in it other than the grantors themselves and hence they could terminate it at will. As the Commissioner states on pages 18 and 19 of his brief, the Tax Court held that the trust was a valid trust and that the trust could not be revoked under Section 166 of the Internal Revenue Code. The Commissioner does not challenge these determinations in his statement of points to be urged set forth on page 19 of his brief. He has abandoned his argument that a valid trust was not created, and he likewise has abandoned his argument that the trust is revocable.

Hence, the above quotation from the Tax Court is particularly significant here. Since admittedly the trust cannot be revoked or terminated by the grantors, the law will not permit them to do indirectly what they cannot do directly and hence California law would not permit the trustors to amend the trust so as to distribute a part of the trust corpus.

As a result of all the foregoing we believe the Tax Court correctly held that stock dividends could not be distributed to the grantors and were not held for future distribution to them within the meaning of Section 167.

The Commissioner's second argument for application of Section 167 is that as a result of the power of appointment reserved to each grantor the stock dividends could be appointed to his estate or to a creditor and hence he could realize the value of the stock dividends during his lifetime.

The Commissioner urges this Court to "consider the *realities* which exist in the case of a general power to appoint corpus, including income added thereto, *to take*

*effect at death*, by means of which the grantor may be able to enjoy the equivalent of the income during his life.  
\* \* \*” (Pages 40 and 41 of his brief.)

The taxpayers, on their part, urge the Court to look at the realities of the situation, and we think it will become apparent that the Commissioner's position is about as *unreal* as could be imagined. Thus, we are told, one of these grantors could approach a prospective creditor or lender and say to him, “If you will give me the value of these stock dividends I will exercise my power of appointment in such a way that upon termination of the trust the stock dividends will be paid to you.” How would the prospect respond to such a proposition?

In looking forward to the day when he might actually receive the stock dividends, the lender or creditor would not merely be speculating upon when the particular grantor would die, for the trust will not terminate on his death. It would be necessary to take into account the fact that the lender or creditor could acquire the stock dividends only upon the death of the last survivor of 20 other individuals. When the trust was created in 1935 these other individuals ranged in age from two months up to 68 years. Seven of the grantors ranged from 28 to 42 years of age. Six other persons whose lives measure the duration of the trust were between 10 and 18 years of age. Six others ranged from three to eight years of age. The stock dividends could be distributed to the prospective lender or creditor only after all of these 21 persons had died.

How long would that be? Certainly 50 years would be a most conservative estimate—probably much longer. The reality of the situation is that a prospective lender or creditor would undoubtedly view the probability that he himself would be dead before the stock dividends could be dis-

tributed to him. How much would he pay a grantor for such a dubious investment?

Mere length of time, however, would not be the only deterrent. What value, if any, would the stock dividends possess 50 years from now—any stock, for that matter? We think it is obvious that a person with means would not invest a nickel in such a proposition.

Hence, the taxpayers vigorously challenge, as a matter of actual fact and reality, the Commissioner's easy assumption that by means of a general power to appoint the corpus, including the stock dividends, the grantor may be able to enjoy the equivalent of the stock dividends during his life. Such a position, instead of dealing with realities, escapes to the realm of theoretical speculation. It ignores actualities.

It would be no answer for the Commissioner to assert, and he does not assert, that Section 167 applies because the grantor could appoint not only the stock dividends but also the income those stock dividends might produce after his death. Section 167 is concerned with the possible distribution of the stock dividends themselves and not with future income those stock dividends may hereafter produce.

Thus, as applied to this case, Section 167 provides that if the stock dividends are "held or accumulated for future distribution *to the grantor*," or may be "distributed *to the grantor*," such stock dividends shall be taxed to the grantor.

In the first part of this reply we demonstrated that the stock dividends cannot be distributed *to the grantors* and cannot be held or accumulated for future distribution *to the grantors*.

So, as an alternative, the Commissioner argues that the power to appoint the stock dividends after a grantor's death

and upon termination of the trust is the equivalent of having the stock dividends distributed to the grantor's estate, and that Section 167 should be construed to apply to income which will revert, not to the grantor himself, but to his estate.

Such an interpretation of Section 167 has been uniformly rejected. In *Lady Marian Bateman*, 43 B. T. A. 69, affd. (C. A. 1) 127 F. 2d 266, 5 per cent of the trust income was to be accumulated and the grantor reserved a power to appoint the trust corpus after her death. The Board of Tax Appeals held that Section 167 did not apply to such accumulated income, saying:

“\* \* \* The accumulation became part of the corpus and could never come into the hands of petitioner. We have been cited to no authority and we find none for the proposition that an accumulation of trust income which may at most redound to the benefit of the grantor's heirs requires taxation of the grantor under section 167. In fact, the contrary has just been held in *Antoinette K. Brown*, 42 B. T. A. 693.”

And the Circuit Court, in affirming the Board on this point, stated as follows on page 269:

“Nor is the five per cent of the net income being ‘held or accumulated for future distribution to the grantor’ within the meaning of §167. This income was added to the principal by the mandatory provision of the trust instrument and will ultimately come to Lady Bateman's testamentary appointees or else in default of appointment to her next of kin by the New York law. In no event can such income be distributed ‘to the grantor’. On this point we agree with the conclusion of the Board in *John P. Wilson v. Commissioner*, 1940, 42 B. T. A. 1260, 1266.”

The Commissioner is also foreclosed on this point by *Mary W. Pingree*, 45 B. T. A. 32, where the trustor had reserved a power to appoint the corpus upon termination of the trust; and the Commissioner contended that capital gains realized by the trust and added to corpus under State law should be taxed to the trustor under Section 167. The Board rejected this argument with the following statement:

“\* \* \* Amounts thus accumulated were never to be distributed to the petitioner and, consequently, section 167 has no application. \* \* \*” (P. 35.)

To the same effect is *Walter S. Halliwell*, 44 B. T. A. 740, reversed on other grounds, *Commissioner v. Halliwell* (C. A. 2), 131 F. 2d 642.

On page 40 of his brief the Commissioner argues that the *Bateman* case was incorrectly decided, for it “failed to consider the realities which exist \* \* \*.” We have shown above that the Commissioner is the one who fails to consider the realities that exist in the present circumstances. The Commissioner also calls attention to the fact that the *Wilson* case, which was cited by the Circuit Court in the *Bateman* case, was subsequently reversed in *Commissioner v. Wilson* (C. A. 7), 125 F. 2d 307, and the Commissioner alleges that:

“\* \* \* the Seventh Circuit’s decision to some extent supports the view that future distribution to the estate of a grantor will satisfy Section 167.”

This is all the authority the Commissioner can muster in support of such an extension of the plain words of Section 167, but the fact is that the *Wilson* case furnishes no support whatever for an argument that distribution to the estate of a grantor will satisfy Section 167.

The capital gains in the *Wilson* case were accumulated as part of the corpus of the trust. The trust was to

terminate upon the death of the life beneficiary, the grantor's daughter, or when her youngest surviving child, if any, attained the age of 20. Upon such termination the trust corpus, including accumulated capital gains, was to be paid to the grantor, if living, otherwise to his estate. The Seventh Circuit held that the capital gains were taxable to the grantor as follows:

“\* \* \* Under such circumstances it seems clear that the case of *Graff v. Commissioner*, 7 Cir., 117 F. 2d 247, is controlling. In that case the capital gains were not distributed to the beneficiary, but were added to the corpus to be paid to the grantor upon the death of his wife, if he was then living, and, if he was not then living, the trustees were to divide the corpus and pay same to the grantor's children. We held that the capital gains were income accumulated for future distribution to the grantor within the meaning of §167(a)(1).”

Thus, the *Wilson* case was decided solely upon the authority of the *Graff* case; and in the latter case there was no provision at all for payment of the accumulated income to the estate of the grantor. Such income was to be paid upon termination of the trust to the grantor, if living, otherwise to alternative remaindermen. The whole basis of the decision was that Section 167 applies by virtue of the possibility that the income may be distributed *to the grantor* personally. His estate was not even involved. Since the same possibility existed in the *Wilson* case—*i. e.*, distribution to the grantor personally—that factor obviously was the sole basis of the Court's decision.

Hence, we submit that there is no authority whatever for the Commissioner's contention that distribution to the estate of a grantor will satisfy Section 167.



It follows that the Tax Court correctly interpreted the Trust Agreement in the present cases as forbidding any distribution of stock dividends to the respondents and correctly held that such stock dividends were not taxable to them under Section 167 of the Revenue Act of 1938 and of the Internal Revenue Code. Its decision should be affirmed.

## II.

**The Tax Court Correctly Held That Chandler Trust No. 2 Should Not Be Ignored for Tax Purposes, That Each Individual Respondent Ceased to Be the Owner of the Assets Contributed by Him to the Trust, and That Each Individual Respondent Therefore Is Not Taxable Under Section 22(a) of the Revenue Act of 1938 and the Internal Revenue Code Upon Stock Dividends Received by the Trust.**

The Commissioner points out on pages 22 and 23 of his brief that the leading case on this point is *Helvering v. Clifford*, 309 U. S. 331. In that case the trust was to exist for only five years. The sole grantor named himself the sole trustee. During the five years he could pay to his wife as much of the trust income as he wished. At the end of the five years the trust corpus was to revert to the grantor, and any accumulated income was to go to the wife. The same disposition of corpus and income would follow upon termination of the trust within the five years, upon the death of either the grantor or his wife.

The Commissioner at the top of page 23 of his brief states that the Supreme Court reaffirmed the rule:

“\* \* \* that legal technicalities or niceties of the law of trusts or conveyances should not be allowed to obscure the basic issue in tax cases, and pointed



out (p. 334) that where the grantor is the trustee and the beneficiaries are members of his family group, special scrutiny of the arrangement is necessary, for purposes of determining whether the grantor is taxable on trust income under Section 22(a)."

This is not quite what the Supreme Court said in the *Clifford* case; and if we go back to the exact language we will find that the words omitted in the above quotation are particularly significant here and point to the opposite conclusion in the present cases. What the Supreme Court actually said on pages 334 and 335 is as follows, and we have italicized the significant language which is omitted from the Commissioner's brief:

"\* \* \* Technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia *which inventive genius may construct as a refuge from surtaxes* should not obscure the basic issue.

\* \* \* And where the grantor is the trustee and the beneficiaries are members of his family group, special scrutiny of the arrangement is necessary *lest what is in reality but one economic unit be multiplied into two or more* by devices which, though valid under state law, are not conclusive so far as §22(a) is concerned."

In other words, the *Clifford* case was an out-and-out tax avoidance plan. The Supreme Court recognized it and dealt with it as such. The whole gist of the case was that, with steeply graduated surtax rates, special scrutiny is necessary "lest what is in reality but one economic unit be multiplied into two or more," and that the Commissioner is not bound by legal technicalities which inventive genius may construct "as a refuge from surtaxes."

The Commissioner argues, however, that the theory of the *Clifford* case is not limited to a small family living under one roof, but can apply, as here, to members of an adult, grown family each living in separate households and each contributing assets to a trust. This argument misses the whole point of the *Clifford* case, namely, that a grantor will not be permitted to create two taxable units where in substance only one economic unit remains. Obviously, in the present cases, before the Chandler Trust No. 2 was created we had more than one economic unit. We had eight economic units. Each grantor lived separate and apart from the other, with his or her own spouse and in most instances with children. Each owned certain shares of stock. Each was taxable upon the income from his or her shares of stock without any relation whatever to the other grantors. Thus, before the trust was created there were eight economic units and there were eight taxable units. In creating the trust, therefore, each grantor did not attempt, as did Clifford, to divide his own little economic unit into two taxable units in order to reduce his surtaxes.

Continuously, since at least the Revenue Act of 1918, the revenue laws of the United States have recognized trusts as separate entities for tax purposes and have provided, substantially in accordance with what is now Sections 161 and 162 of the Internal Revenue Code, that the personal income tax imposed by the Code "shall apply to the income of estates or of any kind of property held in trust \* \* \*." Section 162 specifies that the net income of a trust shall be computed in the same manner as in the case of an individual, except that a trust is allowed to deduct sums distributed or distributable to beneficiaries, which sums are then taxed to the individual beneficiaries of the trust.

There have always been two limitations upon this recognition of a trust as a separate taxable entity. (1) If the grantor can revoke the trust he is taxed upon its income, which seems only just, since he has the power to receive the income whether he sees fit to do so or not. Section 166 of the Internal Revenue Code. This was the situation in *Gaylord v. Commissioner* (C. A. 9), 153 F. 2d 408, where the grantor had failed to make the trust irrevocable and hence under California law it was revocable by him at will. The Commissioner does not contend that the present trust is revocable, and obviously it is not. (2) If the grantor can cause the income to be distributed to him or accumulated for future distribution to him he is taxable upon such income; here, again, upon the rational theory that he should be taxed upon income which is his for the taking. Section 167 of the Internal Revenue Code. We have shown above that this Section does not apply to the present cases.

As surtax rates were graduated more steeply, the fact that a trust was recognized as a separate taxable entity presented an opportunity to attempt to create two taxable units and thereby decrease surtaxes through a trust in which the grantor would retain as much control and ownership as possible. As we have stated, the *Clifford* case was typical of that type of endeavor.

The striking feature of the present case is that Chandler Trust No. 2 was created for reasons diametrically opposed to the purposes which prompt the establishment of the *Clifford*-type trust.

Chandler Trust No. 2 was created for the very purpose of having the grantors surrender rights, powers and control which they theretofore possessed as individual owners of the stock of the two corporations; and to do this without

any thought whatever of reducing either income tax or estate tax. The ordinary income of the trust is distributable to these grantors currently and is therefore taxed to them to the same extent as if the trust had not been created. Provision for such distribution to the grantors would have been ridiculous if they had created the trust to form two taxable units and thus avoid income taxes. It would also have been ridiculous if they had sought to reduce estate taxes, for the same reservation of income for life will subject each trustor's share of the corpus to estate tax under Section 811(c) of the Internal Revenue Code. Hence we feel that the Commissioner's implication of attempted tax avoidance here (page 24 of his brief) is particularly unwarranted.

The trust was created to serve a wholly legitimate and proper purpose. It was prompted by the very fact that the stock in question was not owned by an intimate family group or by one economic unit—which constituted the basic factual background for the *Clifford* case and upon which such emphasis has been placed in later cases. The Chandler family had grown to maturity and constituted many separate family and economic groups when the trust was created in 1935, as we have noted. Prior to creation of the trust these adults each owned stock of The Times-Mirror Company and Chandis Securities Company. As individuals they enjoyed untrammelled rights of ownership. Each could vote his stock as he pleased; he could sell it or give it away; he could pledge it as security for loans; he could exercise any of the privileges of an owner.

The trust was created so that each individual thenceforth would not possess these attributes of ownership—so that he could not vote it as he pleased, give it away, sell it, pledge it or otherwise permit it to fall into the hands

of creditors or other outside interests. Each committed himself to turn over the management of the business to Norman Chandler, and agreed that this could be changed only by the unanimous consent of all eight individuals, including Norman Chandler himself, who normally might be expected to oppose any such change.

In short, these eight individuals intended by the creation of Chandler Trust No. 2 to reduce their rights from those of outright owners to those merely of life tenants with powers to appoint the remainders.

The three factors that were stressed by the Supreme Court in *Helvering v. Clifford*, 309 U. S. 331, were (1) the short term of the trust (five years); (2) the fact that the income sought to be taxed remained in the family group, which before and after the trust was but one economic group; and (3) the complete control reserved to the one individual who was both grantor and trustee. In the present cases (1) the trust is to last during the lives of 21 individuals—as long a term as is permitted by the laws of California; (2) the income sought to be taxed did not remain in any intimate family group (it consisted of stock dividends which were required to be treated as corpus and therefore can go to no one until termination of the trust, decades hence); and (3) the very purpose of the trust was to surrender and relinquish the unlimited rights of ownership.

To apply the *Clifford* doctrine to the present facts would extend that doctrine beyond anything that it has heretofore been thought to cover. We submit that the Commissioner's determination cannot be defended.

After discussing the *Clifford* case, the Commissioner on pages 23 and 24 of his brief cites many cases where

individual grantors have been held taxable upon the income of trusts created by them. The underlying theme running through all of them, as the Commissioner's brief recognizes; is that each grantor in those cases reserved a power directly, in his capacity as sole trustee or through his ability to become the sole trustee or to direct the trustees, to determine who should enjoy the income of the trust from year to year during his lifetime. All these cited cases, therefore, fall within the general principle of which *Commissioner v. Buck* (C. A. 2), 120 F. 2d 775, is typical and is the leading case. It was there pointed out, as it has been pointed out in all the other cited cases, that complete control over the distribution of income *during a grantor's lifetime* is one of the substantial attributes of ownership. In other words, to "sprinkle income about" as the grantor chooses was seized upon in those cases as being perhaps the most important right retained by the grantors.

On page 34 of his brief the Commissioner urges that in the present cases the powers retained by the grantors were greater than those retained in the *Buck* and other cited cases. The Commissioner asserts that in the present case, as in the *Buck* case, the taxpayers, since they were to receive the ordinary income of the trust, could sprinkle it about as they chose. No one denies that, but it is entirely beside the point. On the income thus received each grantor, of course, has paid income tax. It was on that type of income that *Buck* attempted to escape tax. The income with which we are here concerned is the stock dividend income. The grantors, as we have shown, cannot receive the stock dividends. They cannot sprinkle the stock dividends about during their lifetime. Hence, the only income with which we are here concerned is not subject *during the lifetimes of the grantors* to such a power of distribu-



tion as was the income that was involved in the *Buck* and other cases.

And this very fact furnishes the chief basis for distinction between the cases cited by the Commissioner and the cases relied upon by the taxpayers here and by the Tax Court, to the effect that *the mere power to dispose of property after the death of a grantor is not such a power as was involved in the Buck case*. In other words, the Courts have drawn a clear distinction, in applying the *Clifford* doctrine, between a power to sprinkle income about during a grantor's lifetime, and a power merely to appoint after a grantor's death.

That distinction was very clearly stated in *Commissioner v. Bateman*, 127 F. 2d 266, and is a distinction which the Commissioner himself has adopted in his own regulations interpreting the *Clifford* doctrine. We are at a loss to understand why the Commissioner in this particular case should seek to abrogate the distinction which his own regulations have drawn. We shall discuss the regulations in the next section of this brief.

The *Bateman* case was relied upon by the Tax Court, and is attempted to be distinguished by the Commissioner on pages 35 and 36 of his brief.

In the *Bateman* case the taxpayer created a trust which provided that five per cent of the net income should be added to the trust corpus and the balance of the income should be currently distributed to the taxpayer-trustor. On her death the trust corpus was to be distributed as she should appoint by her Last Will or by any written instrument signed before two witnesses. Any appointment during her lifetime was revocable. In default of appointment, the property was to go to her blood relations under the



New York laws of intestacy. The taxpayer had borrowed \$27,000.00 from the trust, giving her note and securities as collateral (and in this latter respect the case was of course much stronger for the Commissioner than the present cases).

The Board of Tax Appeals began its opinion by stating the issues as follows:

“\* \* \* Petitioner and respondent are at issue here solely in regard to the 5 percent of the trust income which, by the indenture, was to be added to corpus, there being no question, of course, that the balance of the income is taxable to petitioner. Concisely stated, respondent’s position is that petitioner’s reservation of the power to appoint the corpus makes her taxable on the entire income arising therefrom. From his brief it would appear that he is relying mainly on section 22(a) of the Revenue Acts of 1934 and 1936, and *Helvering v. Clifford*, 309 U. S. 331. He points specifically to petitioner’s ability, as demonstrated by her borrowings from the trust in 1932 and preceding years, to secure full economic benefits from the trust corpus merely by obtaining loans from the trustees and appointing sufficient of the trust corpus to the trustees to secure them.” (P. 71.)

The issue was decided in favor of the taxpayer, notwithstanding her borrowing from the trust corpus, the Board stating at page 72:

“\* \* \* we are not impressed with respondent’s contention that petitioner, by reserving a power to appoint the reversionary interest in the trust estate, retained such dominion over the corpus as to make her taxable under section 22(a). \* \* \*”

The Court of Appeals for the First Circuit affirmed the Board in an exhaustive opinion. The case of *Commissioner v. Buck*, 120 F. 2d 775, had been decided earlier by the Second Circuit and had taxed to the grantor income which he had the power to sprinkle among the beneficiaries as he saw fit during his lifetime. The First Circuit stated:

“\* \* \* In contrast to the *Buck* case, she [Mrs. Bateman] cannot command the distribution of income or principal at any time during her lifetime to objects of her bounty. \* \* \*” (P. 271.)

The gist of the First Circuit’s opinion holding that Mrs. Bateman was no longer the substantial owner of the trust property is found on page 271 as follows:

“\* \* \* By the trust indenture the taxpayer irrevocably surrendered up control over investment and reinvestment of the corpus, and voting rights to the stock. In no event may she be revested with title to the corpus. She can no longer spend or give away the principal or the income during her lifetime. Assuming she has other property ample for her needs, it still is difficult to deny that as to the property she conveyed to trustees she gave up such substantial rights normally associated with the concept of ‘full ownership’ that she should no longer be deemed in substance the ‘owner’ of the corpus within the rationale of the *Clifford* case.”

We respectfully submit that the same conclusion must be reached upon our parallel facts here, as the Tax Court held.

The Commissioner on page 36 of his brief attempts to distinguish the *Bateman* case upon the grounds (1) that there the trustees were two independent and disinterested parties, (2) the corpus of the trust did not consist of stocks

in corporations which the grantor controlled, and (3) the taxpayer there could not amend the trust to make the accumulated income distributable to her as an income beneficiary.

The distinctions, we submit, are without substance. As we have shown, the taxpayers here cannot draw down the stock dividends, and hence in that respect there is no distinction between these cases and the *Bateman* case. Nor did any grantor in this case, alone, control either of the corporations involved, either before the trust was created or after. The fact that the eight grantors together controlled the Chandis Securities Company after the trust was created is without significance. They controlled it together before the trust was created. In other words, before the trust was created no one grantor controlled Chandis but all of their stock taken together was sufficient for control. After the trust was created the trustees either unanimously or by majority vote could control Chandis, but this power obviously was not vested in any one grantor.

And finally we fail to see any distinction in substance between the cases in the fact that each grantor here was one of eight trustees. It is one thing to name the grantor as sole trustee of a trust created by him, with power to sprinkle income during his lifetime, but it is certainly an entirely different thing to join in a trust and become one of eight trustees and effectively surrender control during one's lifetime of the disposition of stock dividends with which we are here concerned.

The Commissioner argues on page 37 of his brief that this case is more analogous to *Klein v. Commissioner*, 4 T. C. 1195, affirmed *per curiam*, 154 F. 2d 58. A brief statement of the facts in the *Klein* case will reveal how very different it was from the present circumstances.

The taxpayer there was 37 years of age, married but without children. He was the sole stockholder and president of Empire Box Corporation. The trust, of which the taxpayer and a friend were co-trustees, was created under the following conditions, as stated in the Court's findings of fact:

"In December 1939 the corporation was about to declare current and arrearage dividends upon its 7 percent preferred stock, of which petitioner held 1,497 shares. On December 8, 1939, the petitioner, knowing of the corporation's intention to pay current dividends of \$3.50 per share and arrearage dividends in the amount of \$60,756.50, created the trust hereinafter described. This he did after conferring with his personal attorney and a tax advisor. His purpose in creating the trust was to prevent himself from immediately putting back into the business of the corporation the proceeds of the anticipated dividends, a practice indulged in by him in the past which subjected his entire personal fortune to the full risks of one business, to avoid as much as possible taxation incident to the receipt of these dividends, and to minimize his future income taxes.

"\* \* \* The life expectancy of both petitioner and his wife was in excess of 20 years in 1939."

The declaration of trust provided that the income should be accumulated until the death of the survivor of the taxpayer and his wife or for 20 years, whichever first occurred. Following such period, the income was to be paid to the wife for her life, *or such other beneficiaries as the trustor should from time to time designate*. The trust was to terminate upon the death of the survivor of the trustor and his wife, or of the trustor alone if the

wife was not an income beneficiary, and the corpus was to be distributed as the trustor should appoint.

The trust reserved the following powers to the trustor:

“\* \* \* that the Trustor reserves the right and shall have the power at any time during his life by an instrument in writing delivered to the Trustees or upon his death by his last Will and Testament, to modify or alter this agreement by removing his then co-trustee and appointing another individual or trust company as co-trustee in the place and stead of the co-trustee so removed, by disposing of the distributable income of the trust estate as originally constituted, or as it may exist from time to time, otherwise than as originally provided in this indenture, by altering the proportion or amount of income to be paid to, or applied to the use of any one or more of the beneficiaries upon the termination of the period of accumulation, by cancelling any benefaction to any one or more of the beneficiaries, by substituting another beneficiary or beneficiaries in the place of any one or more of them, by adding to the number of beneficiaries, by providing for the proportion or amount of income to be paid or applied to the use of such additional or substitute beneficiaries upon the termination of the period of accumulation; \* \* \*”

The Tax Court, after noting that the taxpayer relied upon the *Bateman* case, held as follows:

*“However, that case, it is apparent, was much stronger for the taxpayer than is the one which is now before us. In this case the settlor is also one of two cotrustees having broad administrative powers; he has the absolute power to remove his cotrustee; the original cotrustee and his designated successor were close business associates of petitioner;*

the corpus of the trust consisted of securities of a corporation completely dominated by petitioner; and the petitioner *settlor not only had the power to provide for the disposition of the accumulated income upon his death, but also had the power to designate the beneficiary or beneficiaries who should enjoy the income after 1959, if the trust should last that long (and that date was well within petitioner's life expectancy).*

“We are of the opinion that the facts here present are more analogous to *Commissioner v. Buck, supra*, than to the *Bateman* case.” (Emphasis supplied.)

The foregoing quotations make several points very clear: the first is that the Court casts no doubt upon the correctness of the *Bateman* case as applied to its own facts. The second is that the *Klein* case was more like the *Buck* case than the *Bateman* case, and hence more favorable to the Government. It should be borne in mind that the *Buck* case was decided before the *Bateman* case. The factors which made the *Klein* case more like the *Buck* case than the *Bateman* case are as follows:

1. The power to change the beneficial enjoyment of the income *during the grantor's lifetime*—instead of merely the power to appoint the remainder interests for enjoyment *after the grantor's death*. This is a vital distinction, and one that is observed even in the Commissioner's amended regulations on the *Clifford* doctrine, as shown hereinafter.

2. *Klein* had absolute administrative control over the trust, with complete power to remove the co-trustee, and he completely dominated the corporation the stock of which constituted the trust corpus. In the present case no one of the petitioners has such control over the administrative features of the trust nor over the corporations.

3. The *Klein* case trust was created for the purpose of accumulating income for 20 years, whereas in the present case the ordinary income is currently distributable. This difference calls for a difference in tax results even under the amended regulations, as hereinafter shown.

We submit that in all vital respects the present cases must be governed by the *Bateman* case and that the *Klein* and *Buck* cases are distinguishable, as indeed they were distinguished in the *Bateman* and *Klein* opinions, upon a distinction which the Commissioner has embraced in his regulations.

The Commissioner then asserts that the trustees of the present trust were not required or expected "to exercise the usual fiduciary powers of trustee," and on page 31 of his brief he challenges the Tax Court's holding that the trustees are "independent," asserting that they cannot be independent of themselves as trustors.

We submit that the Commissioner fails to analyze the situation. In rejecting his attempts to distinguish the *Bateman* case, the Tax Court stated [R. 59-60]:

"We can not agree with the distinctions suggested by the respondent. The trust herein had as its principal purpose the family control of The Times stock so that Norman Chandler would be assured the presidency and general managership of The Los Angeles Times. This was a business, and not a tax-avoidance, purpose. The receipt by the trustor-beneficiaries of substantially the same cash income from the trust as they would have received had the property not been conveyed in trust also refutes the respondent's suggestion that the trust was created for tax-avoidance purposes. Nor are we impressed with the suggested distinction that each trustor did not convey to independent trustees. It is true that each trustor



was a member of the Chandler family, but it is also true that each was an adult member of that family. The trust was not dominated by one or both parents, as is frequently true in trusts created for tax-avoidance purposes. We are convinced that the other seven trustees were independent of the trustor-trustee who conveyed the property."

The Commissioner's approach to this case flows from his inability or unwillingness to regard each of these taxpayers as an individual. He treats them as individuals to the extent that he would collect from each of them, individually, a substantial income tax; but in attempting to justify such an individual tax he forgets that each is an individual and regards them merely as members of a "closely knit family groups," each purportedly subservient to the wishes of the others.

But the doctrine of *Helvering v. Clifford*, *supra*, is not based upon such total disregard of individuals as entities. As the Board of Tax Appeals stated in *Estate of Frederick S. Fish*, 45 B. T. A. 120, 123:

"\* \* \* Even under such decisions as *Helvering v. Clifford*, 309 U. S. 331, the concept of family unity is an economic consideration rather than one of conduct or behavior. The inclusion in the husband's income of that derived from a trust of which members of his family are the beneficiaries results more from the view that family finances are a single unit generally furnished by the husband or father than that the action of individual members of the family group will necessarily accord with the dictates of its head. \* \* \*

The Commissioner here seeks to apply the *Clifford* doctrine of family unity as one of conduct or behavior. Thus,

he would treat each trustor in effect as the sole trustee, because the other seven co-trustees are related to him. But the Tax Court correctly appraised the situation and the true basis of the *Clifford* doctrine. When one of the trustors in this case conveyed his stock to himself and seven others as trustees, he certainly expected and directed the other seven to exercise whatever powers they possessed as trustee in a proper fiduciary manner. And that trustor certainly had no power to control the conduct or behavior of the seven other trustees, notwithstanding that they were his adult brothers and sisters. This is what the Tax Court meant when it held that each trustor conveyed his property in trust to "independent" trustees; and obviously its conclusion was correct. Thus, even the provision authorizing a trustee to deal with the trustees or with any corporation the stock of which is held in the trust is subject to this strict fiduciary limitation:

"\* \* \* so long as he, she or it shall fully disclose to the remaining Trustees the nature of such relationship" and "so long as a majority of all the Trustees have notice of such interest of such Trustee in such transaction and shall approve thereof." [R. 44-45.]

In view of all the foregoing it is respectfully submitted that the Tax Court applied correct legal principles embraced within Section 22(a) and the *Clifford* doctrine, that the Tax Court knew the theory and purpose back of the *Clifford* doctrine, and that it properly refused to permit the application of that doctrine to the very different facts and purposes involved in Chandler Trust No. 2.

III.

The Individual Respondents Are Not Taxable on the Stock Dividends Under the Commissioner's Regulations Defining the Scope of *Helvering v. Clifford*, 309 U. S. 331.

The Appendix to the Commissioner's brief does not set forth the regulations under Section 22(a) of the Internal Revenue Code having to do with the taxation of trust income to the grantor of a trust under the *Clifford* doctrine. Such regulations are lengthy and are set forth in full in the Appendix to this brief. They were added to the regulations by Treasury Decision 5488, C. B. 1946-1, 19 (26 C. F. R., 29.22(a)-21), and were amended by Treasury Decision 5567, C. B. 1947-2, 9, published in the Federal Register July 4, 1947.

The regulations provide that they shall be applicable in determining the taxability of trust income for taxable years beginning after December 31, 1945; and presumably for this reason the Commissioner's brief does not set them forth in the present case, which concerns the years 1938 through 1941. But we wish to point out that on the same day the regulations were amended, June 30, 1947, the Commissioner of Internal Revenue promulgated a ruling known as Mim. 6156, C. B. 1947-2, 13, in which reference is made to the fact that the regulations are applicable only to taxable years beginning after December 31, 1945, and where the following rule is announced:

“\* \* \* However, it will be the policy of the Bureau, where no inconsistent claims prejudicial to the Government are asserted by trustees or bene-

ficiaries, not to assert liability of the grantor for any prior taxable year under the general provisions of section 22(a) of the Internal Revenue Code if the trust income would not be taxable to the grantor under the regulations as amended.”

In other words, the Commissioner of Internal Revenue, who is the petitioner in the present case, has adopted the rule that if trust income would not be taxable to grantors of trusts under his regulations dealing with later years, he will not tax such grantors on the trust income for prior taxable years. Hence, if this Court should be of the opinion that the taxpayers are taxable upon the stock dividends in the absence of the regulations, we believe that a consideration of those regulations is appropriate to determine whether the tax is properly imposed under those regulations. The taxpayers made this contention before the Tax Court, but in view of the Court's decision that the taxpayers were not taxable in any event upon the stock dividends, it became unnecessary to consider the application of the regulations. See the Court's reference to this contention at the conclusion of its opinion. [R. 66-67.]

It will be observed from the regulations set forth in the Appendix hereto that the Bureau recognized that in the absence of precise guides supplied by regulation the application of the *Clifford* principle to varying and diversified factual situations

“has led to considerable uncertainty and confusion. The provisions of this section accordingly resolve the present difficulties of application by defining and specifying those factors which demonstrate the retention by the grantor of such complete control of the trust that he is taxable on the income therefrom under Section 22(a). \* \* \*

The regulations then go on to specify the three factors, any one of which will cause income to be taxed to the grantor. The first factor applies to short-term trusts, having to do with reversions of corpus or income to the grantor within a period of 10 years or, under certain circumstances, 15 years.

This factor obviously has no application to the present case, for there is no reversionary interest to the grantors in the corpus of the trust or in the income (consisting of stock dividends) with which we are here concerned, they having been conveyed in trust for as long a period as is permitted by the laws of California.

The second factor subjects a grantor to tax upon income of a trust, regardless of its duration, if the beneficial enjoyment of the corpus or income is subject to a power of disposition by the grantor or any person not having a substantial adverse interest. But there are several limitations upon this factor, which take the present cases out of its scope. For instance, it is provided that:

“\* \* \* The grantor is not taxable, however, if the power, whether exercisable with respect to corpus or income, may only affect the beneficial enjoyment of the income for a period commencing 10 years from the date of the transfer (or 15 years \* \* \*). \* \* \*”

Another exception to the second factor is set forth in the following provisions:

“The foregoing provisions of this paragraph shall not apply to any one or more of the following powers:

(1) a power exercisable only by will, other than a power in the grantor to appoint the income of the trust where the income is accumulated for such

disposition by the grantor, or may be so accumulated in the discretion of the grantor, or any person not having a substantial adverse interest in the disposition of such income, or both. For example, if a trust provides that the income is to be accumulated during the grantor's life and that the grantor may appoint the accumulated income by will, the grantor is taxable on the trust income \* \* \*."

Thus, the regulations, as heretofore noted, draw the same distinction that at least five cases have drawn: a power to sprinkle income about during a grantor's lifetime renders the grantor taxable, as in the *Buck* and *Klein* cases; but a mere power to appoint after the grantor's death does not, as was held in the *Bateman*, *Pingree* and *Hallivell* cases, *supra*.

In the present case each grantor reserved the right to designate who shall enjoy the income from the property after his or her death and who shall ultimately receive his or her share of the corpus of the trust at its termination upon the death of the last survivor of 21 individuals. Hence, we submit that the individual grantors are not taxable upon the stock dividends in the present case, under the regulations, by virtue of the reserved power to appoint the beneficial enjoyment of the property after their respective deaths.

The third factor specified in the regulations is termed "Administrative Control." Trust income is taxable to a grantor if "administrative control is exercisable primarily for the benefit of the grantor rather than the beneficiaries of the trust." But what is of particular significance is that the regulations go on to specify with great particularity what will be deemed to constitute "administrative

control exercisable primarily for the benefit of the grantor." It consists of:

(1) A power exercisable by the grantor or any person without a substantial adverse interest whereby the grantor or any person can purchase, exchange, or otherwise deal with or dispose of the corpus or the income of the trust "for less than an adequate and full consideration in money or money's worth."

(2) A power exercisable by the grantor or any person without a substantial adverse interest whereby the grantor can borrow the corpus or income, directly or indirectly, without adequate interest or without adequate security.

(3) Instances where the grantor has directly or indirectly borrowed the corpus or income and has not completely repaid the loan including interest before the beginning of the taxable year.

(4) Any one of the following powers exercisable in a "non-fiduciary capacity" by the grantor or any person without a substantial adverse interest: to vote or direct the voting of stock, to control the investment of trust funds, and to reacquire the trust corpus by substituting other property of an equivalent value.

The regulations then go on to provide that if a power is exercisable by a person as trustee, it is presumed that the power is exercisable in a "fiduciary capacity" primarily in the interests of the beneficiaries. And the regulations specify that the mere fact that a power exercisable by a trustee is described in broad language does not indicate that the trustee is authorized to purchase, exchange, or otherwise deal with or dispose of the trust property or income for less than an adequate and full consideration in money or money's worth, or is authorized



to lend the trust property to the grantor without adequate interest.

In the present case the Commissioner's brief contains much loose argument regarding what he calls "administrative control." It is asserted throughout his brief that powers have been reserved in Chandler Trust No. 2 which are intended to be exercisable by the taxpayers solely for their own selfish interests and without the usual fiduciary responsibility.

There is no merit whatever in these general and vague assertions. We believe it was incumbent upon the Commissioner, in view of desired uniformity of application of the law, to govern his allegations regarding administrative control by the standards which he himself has set up in the regulations. Nowhere in the trust instrument is there any authority or power on the part of any of the taxpayers in any capacity—whether as grantor, trustee or beneficiary—to acquire the trust corpus or the stock dividends or any part of them under any circumstances, let alone for less than an adequate and full consideration in money and money's worth. There is no power whatever in the trust instrument under which any of the grantors can borrow from the trust corpus or stock dividends, either with or without interest, and indeed such disposition of the trust corpus would violate the very purpose for which the trust was created and is specifically prohibited by the express language of the trust instrument and by the whole meaning of the document. Nor has any of the grantors borrowed any of the corpus or stock dividends at any time. And, finally, all powers dealing with investment and reinvestment of the trust corpus and the voting of stock constituting a part of the trust corpus are vested in trustees in their capacity as trustees. Under the wording of the regulations it is therefore presumed

that such powers are intended to be exercisable in a fiduciary capacity. And the regulations say that this presumption can be rebutted only by looking at the actual operation of the trust to see whether or not such powers have in fact been exercised in a non-fiduciary capacity.

We challenge the Commissioner to point to one circumstance in the operation of Chandler Trust No. 2 which would cast the slightest doubt upon the plain fact that the trust at all times has been administered in accordance with the very strictest fiduciary obligations. The trust agreement directs the trustees at all cost to preserve and protect the shares of stock that were delivered to them and to retain the proportionate interest which they represented in the two corporations. The trustees have meticulously adhered to that declaration. When stock dividends were received, which if distributed would have diluted the interests of the trust in the corporations, the trustees never for a moment had any thought other than obeying the direction of the trust instrument that such stock dividends should inure to and fall upon the principal and be treated as part of the trust estate for ultimate distribution to the remaindermen; and the stock dividends have always been so considered and so held as part of the trust corpus. In short, the activities of the trustees have in reality been confined to the receipt of taxable cash dividends upon the stocks which the trust owns and the distribution of such dividends to the beneficiaries of the trust as set forth therein. It will be observed that nowhere in the Commissioner's brief is there any allegation that any powers have been actually exercised by the trustees in anything but a fiduciary capacity. We find only vague assertions that the trustees can abuse their discretion, nullify the whole purpose and intent of creating the trust, and violate the fiduciary

responsibilities placed upon them. Such arguments run afoul of the Commissioner's own regulations, which we have summarized above.

The grantors of this trust, being persons of substance and character, created it to serve a bona fide and wholly legitimate purpose, with no thought whatever of income taxes or estate taxes. They have been content in the 15 years since it was created to abide by its terms and to carry it into faithful operation. We think it does not lie within the province of the Commissioner of Internal Revenue to take it upon himself to challenge the existence of the trust for tax purposes upon the assumption that these individuals will attempt to thwart its purpose and violate all the rules and canons of fiduciary responsibility. They would have no purpose to do so even were it permissible under the laws of California, which it is not.

### Conclusion.

The opinion and decisions of the Tax Court were in all respects sound and should be affirmed.

Dated October 17, 1950.

Respectfully submitted,

A. CALDER MACKAY,  
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## APPENDIX.

### Internal Revenue Code:

#### "SEC. 22. GROSS INCOME.

(a) General Definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service \* \* \* of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.  
\* \* \*

#### "SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; \* \* \*

\* \* \* \* \*

then such part of the income of the trust shall be included in computing the net income of the grantor."

The corresponding Sections of the Revenue Act of 1938 were substantially the same.

Treasury Regulations 111, Section 29.22(a)-21 is as follows:

“SEC. 29.22(a)-21. TRUST INCOME TAXABLE TO THE GRANTOR AS SUBSTANTIAL OWNER THEREOF—(a) *Introduction*.—Income of a trust is taxable to the grantor under section 22 (a) although not payable to the grantor himself and not to be applied in satisfaction of his legal obligations if he has retained a control of the trust so complete that he is still in practical effect the owner of its income. *Helvering v. Clifford*, 309 U. S. 331. In the absence of precise guides supplied by an appropriate regulation, the application of this principle to varying and diversified factual situations has led to considerable uncertainty and confusion. The provisions of this section accordingly resolve the present difficulties of application by defining and specifying those factors which demonstrate the retention by the grantor of such complete control of the trust that he is taxable on the income therefrom under section 22(a). Such factors are set forth in general in paragraph (b) and in detail in paragraphs (c), (d) and (e), below.

(b) *In general*.—In conformity with the principle stated in paragraph (a) above, the income of a trust is attributable to the grantor (except where such income is taxable to the grantor's spouse or former spouse under section 22 (k) or 171 if—

(1) the corpus or the income therefrom will or may return after a relatively short term of years (see paragraph (c));

(2) the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition (other than certain excepted powers), whether by revocation, alteration or otherwise, exercisable by



the grantor, or another person lacking a substantial adverse interest in such disposition, or both (see paragraph (d)); or

(3) the corpus or the income therefrom is subject to administrative control, exercisable primarily for the benefit of the grantor (see paragraph (e)).

*(c) Reversionary interest after a relatively short term.*

—Income of a trust is taxable to the grantor where the grantor has a reversionary interest in the corpus or the income therefrom which will or may reasonably be expected to take effect in possession or enjoyment—

(1) within 10 years commencing with the date of the transfer, or

(2) within 15 years commencing with the date of the transfer if the income is or may be payable to a beneficiary other than a donee described in section 23 (o) and if any one or more of the following powers of administration over the trust corpus or income are exercisable solely by the grantor, or spouse (living with the grantor, and not having a substantial adverse interest in the corpus or income of the trust), or both, whether or not exercisable as trustee: a power to vote or direct the voting of stock or other securities, a power to control the investment of the trust funds either by directing investments or reinvestments or by vetoing proposed investments or reinvestments, and a power to reacquire the trust corpus by substituting other property, whether or not of an equivalent value.

Where the grantor's reversionary interest is to take effect in possession or enjoyment by reason of some event other than the expiration of a specific term of years, the

trust income is nevertheless attributable to him if such event is the practical equivalent of the expiration of a period less than 10 or 15 years, as the case may be. For example, a grantor is taxable on the income of a trust if the corpus is to return to him or his estate on the graduation from college or prior death of his son, who is 18 years of age at the date of the transfer in trust. Trust income is, however, not attributable to the grantor where such reversionary interest is to take effect in possession or enjoyment at the death of the person or persons to whom the income is payable.

In general, a reversionary interest may reasonably be expected to take effect in possession or enjoyment within 10 or 15 years, as the case may be, where the corpus or the income therefrom is to be reacquired if the grantor survives any stated contingency which is of an insubstantial character. Thus, the grantor is taxable where the trust income is to be paid to the grantor's wife for three years, and the corpus is then to be returned to the grantor if he survives such period, or to be paid to the grantor's wife if he is already deceased.

Any postponement of the date specified for the reacquisition of possession or enjoyment of the reversionary interest is considered a new transfer in trust commencing with the date on which the postponement is effected and terminating with the date prescribed by the postponement. But income for any period shall not be taxable to the grantor by reason of the preceding sentence if such income would not be taxable to him in the absence of such postponement.

*Example.* A places property in trust for the benefit of his son B. Upon the expiration of 12 years or the earlier death of B the property is to be paid over to A

or his estate. Neither A nor his wife has any power of administration over the trust corpus or income. After the expiration of nine years A extends the term of the trust for an additional two years. A is considered to have made a new transfer in trust for a term of five years. He is not taxable on the income for the first three years of such term because he would not be taxable thereon if the term of the trust had not been extended. A is taxable, however, on the income for the remaining two years.

(d) *Power to determine or control beneficial enjoyment of income or corpus.*—Income of a trust is taxable to the grantor where, whatever the duration of the trust, the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition (except as provided in section 167 (c) and as hereafter provided in subparagraphs (1) to (4), inclusive), whether by revocation, alteration, or otherwise, exercisable (in any capacity and regardless of whether such exercise is subject to a precedent giving of notice or is limited to some future date) by the grantor, or any person not having a substantial adverse interest in the beneficial enjoyment of the corpus or income, whichever is subject to the power, or both. The grantor is not taxable, however, if the power, whether exercisable with respect to corpus or income, may only affect the beneficial enjoyment of the income for a period commencing 10 years from the date of the transfer (or 15 years where any power of administration specified in paragraph (c) is exercisable solely by the grantor, or spouse living with the grantor and not having a substantial adverse interest, or both, whether or not as trustee). For example, if a trust created on January 1, 1940 provides for the payment of

income to the grantor's wife, and the grantor does not reserve any such administrative power but reserves the power to substitute other beneficiaries in lieu of his wife on or after January 1, 1950, the grantor is not taxable on the trust income for the period prior to January 1, 1950. But the income will be attributable to the grantor for the period beginning on such date unless the power is relinquished. If the beginning of such period is postponed, such postponement is considered a new transfer in trust commencing with the date on which the postponement is effected and terminating with the date prescribed by the postponement. But income for any period shall not be taxable to the grantor by reason of the preceding sentence if such income would not be taxable to him in the absence of such postponement. Where the income affected by the power is for a period beginning by reason of some event other than the expiration of a specific term of years, the grantor will be taxable if such event is the practical equivalent of the expiration of a period less than 10 or 15 years, as the case may be, in accordance with the criteria stated in paragraph (c).

The foregoing provisions of this paragraph shall not apply to any one or more of the following powers:

(1) a power exercisable only by will, other than a power in the grantor to appoint the income of the trust where the income is accumulated for such disposition by the grantor, or may be so accumulated in the discretion of the grantor, or any person not having a substantial adverse interest in the disposition of such income, or both. For example, if a trust provides that the income is to be accumulated during the grantor's life and that the grantor may appoint the accumulated income by will, the grantor is taxable on the trust income;

(2) a power to determine the beneficial enjoyment of the corpus or the income therefrom if such corpus or income, as the case may be, is irrevocably payable for the purposes and in the manner specified in section 23 (o);

(3) If (i) the power is exercisable by a trustee or trustees, none of whom is the grantor, spouse living with the grantor, or a related or subordinate trustee of the type and under all the conditions referred to in subparagraph (4) (ii), and (ii) the exercise of the power is not subject to the approval or consent of any person other than such trustee or trustees, this paragraph shall not apply to a power—

(A) to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries,

(B) to pay out corpus to or for a beneficiary or beneficiaries or to or for a class of beneficiaries (whether or not income beneficiaries).

The powers herein described include all the powers described in subparagraph (4), since the latter powers are more limited than those herein described.

(4) If the power—

(i) is exercisable by the grantor or spouse living with the grantor, or both, whether or not as trustee, or

(ii) is exercisable (A) solely by a trustee or trustees who include the father, mother, issue, brother, sister, or employee of the grantor, or a subordinate employee of a corporation in which the grantor is an executive or in which the stockholdings of the grantor and the trust are significant from the

viewpoint of voting control, and (B) in a manner which may effect the interests of beneficiaries which include the spouse or any child of the grantor (see subparagraph (3) for a power exercisable by a related or subordinate trustee of the class hereinabove described where the exercise of the power does not affect the interest of the spouse or a child of the grantor or where the power is exercisable only with the concurrence of an unrelated and nonsubordinate trustee), or

(iii) is exercisable by any person or persons other than as trustee, or

(iv) is exercisable by any trustee or trustees, and the exercise of the power is subject to the approval or consent of any person or persons (other than such trustee or trustees), or of the grantor or spouse living with the grantor, or both, in the capacity of trustee,

this paragraph shall not apply—

(aa) to a power to pay out corpus to or for a beneficiary or beneficiaries or to or for a class of beneficiaries (whether or not income beneficiaries), provided that the power is limited by a reasonably definite external standard. Such standard must be set forth in the trust instrument and must consist of needs and circumstances of the beneficiaries;

(bb) if the power is not limited by a reasonably definite external standard, to a power to pay out corpus to or for any current income beneficiary, provided that any such payment of corpus must be chargeable against the proportionate share of corpus held in trust for the payment of income to such beneficiary as if such corpus constitutes a separate trust;

(cc) to a power to distribute or apply income to or for any current income beneficiary or to accumulate such income for him, provided that any accumulated income must ultimately be payable to the beneficiary from whom distribution or application is withheld, to his estate, or to his appointees (or persons named as alternate takers in default of appointment) provided that such beneficiary possesses a power of appointment which does not exclude from the class of possible appointees any person other than the beneficiary, his estate, his creditors or the creditors of his estate; or, if payable upon the termination of the trust or in conjunction with a distribution of corpus which distribution is augmented by such accumulated income, is ultimately payable to the current income beneficiaries in shares which have been irrevocably specified in the trust instrument. Accumulated income shall be considered so payable although it is provided that if any beneficiary does not survive a date of distribution which may reasonably be expected to occur within the beneficiary's lifetime, the share of such deceased beneficiary is to be paid to such persons as the beneficiary may appoint, or is to be paid to one or more designated alternate takers (other than the grantor or the grantor's estate) if the share of such alternate taker or the shares of such alternate takers have been irrevocably specified in the trust instrument;

(dd) to a power, exercisable only during (1) the existence of a legal disability of any current income beneficiary, or (2) the period in which any income beneficiary shall be under the age of twenty-one years, to distribute or apply income to or for such



beneficiary or to accumulate and add such income to corpus;

(ee) in a case falling under subdivision (ii) hereof, to a power to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries, whether or not the conditions in subdivision (cc) or (dd) are satisfied, provided that such power is limited by a reasonably definite external standard. For the requirements of such standard, see subdivision (aa) hereof.

A power does not fall within the powers described in subparagraphs (3) and (4) if the trustee is enabled to add to the class of beneficiaries designated to receive the income or corpus, except insofar as provision may be made for after-born or after-adopted children. A mere power to allocate receipts as between corpus and income, even though expressed in broad language, is not deemed a power over beneficial enjoyment with respect to income or corpus.

(e) *Administrative control*.—Income of a trust, whatever its duration, is taxable to the grantor where, under the terms of the trust or the circumstances attendant on its operation, administrative control is exercisable primarily for the benefit of the grantor rather than the beneficiaries of the trust. Administrative control is exercisable primarily for the benefit of the grantor where—

(1) a power exercisable by the grantor, or any person not having a substantial adverse interest in its exercise, or both, whether or not in the capacity of trustee, enables the grantor or any person to purchase, exchange or otherwise deal with or dispose of the corpus or the income therefrom for less than an

adequate and full consideration in money or money's worth; or

(2) a power exercisable by the grantor, or any person not having a substantial adverse interest in its exercise, or both, whether or not in the capacity of trustee, enables the grantor to borrow the corpus or income, directly or indirectly, without adequate interest in any case, or without adequate security except where a trustee (other than the grantor or spouse living with the grantor) is authorized under a general lending power to make loans without security to the grantor and other persons and corporations upon the same terms and conditions; or

(3) the grantor has directly or indirectly borrowed the corpus or income, and has not completely repaid the loan, including any interest, before the beginning of the taxable year; or

(4) any one of the following powers of administration over the trust corpus or income is exercisable in a nonfiduciary capacity by the grantor, or any person not having substantial adverse interest in its exercise, or both: a power to vote or direct the voting of stock or other securities, a power to control the investment of the trust funds either by directing investments or reinvestments or by vetoing proposed investments or reinvestments, and a power to reacquire the trust corpus by substituting other property, of an equivalent value.

If a power is exercisable by a person as trustee, it is presumed that the power is exercisable in a fiduciary capacity primarily in the interests of the beneficiaries. Such presumption may be rebutted only by clear and convincing

proof that the power is not exercisable primarily in the interests of the beneficiaries. If a power is not exercisable by a person as trustee, the determination of whether such power is exercisable in a fiduciary or a nonfiduciary capacity depends on all the terms of the trust and the circumstances surrounding its creation and administration. For example, where the trust corpus consist of diversified stocks or securities of corporations the stock of which is not closely held and in which the holdings of the trust, either by themselves or in conjunction with the holdings of the grantor, are of no significance from the viewpoint of voting control, a power with respect to such stocks or securities held by a person who is not a trustee will be regarded as exercisable in a fiduciary capacity primarily in the interests of the beneficiaries. Where the trust corpus consists of stock or securities of a closely-held corporation, such a power may or may not, depending upon all the facts, be considered exercisable in a fiduciary capacity.

The mere fact that a power exercisable by the trustee is described in broad language does not indicate that the trustee is authorized to purchase, exchange or otherwise deal with or dispose of the trust property or income for less than an adequate and full consideration in money or money's worth, or is authorized to lend the trust property or income to the grantor without adequate interest. On the other hand, such authority may be indicated by the actual administration of the trust.

(f) *Limitations of section.*—Despite the limitations of this section, the grantor of a trust directing the payment or application of the income therefrom in satisfaction of the grantor's legal obligations shall continue to be taxable on the income. The grantor may also be taxable on the

income of a trust on the ground that such income is attributable to him in a capacity unrelated to dominion and control over the trust as such are defined in subsections (c), (d) and (e) of this section. Thus, the provisions of this section do not affect the principles governing the taxability of future income to the assignor thereof whether or not the assignment is by means of a trust. Nor, for example, do the provisions of this section affect the applicability of section 22(a) to the creator of a family partnership. See further sections 166 and 167.

Section 22(a) shall be applied in the determination of the taxability of trust income for taxable years beginning prior to January 1, 1946 without reference to this section."



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In the  
**United States**  
**Court of Appeals**  
**For the Ninth Circuit**

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In the Matter of the Application for a Writ of  
Habeas Corpus of FRED RAYMOND KOENIG,  
*Appellant,*

v.

JOHN R. CRANOR, As Superintendent of the  
Washington State Penitentiary at Walla  
Walla, Washington, *Appellee.*

No. 12551

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APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN DISTRICT OF  
WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

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**BRIEF OF APPELLEE**

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**FILED**

JUL 3 1950

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In the  
United States  
Court of Appeals  
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In the Matter of the Application for a Writ of Habeas Corpus of FRED RAYMOND KOENIG, <i>Appellant,</i>	}	No. 12551
v.		
JOHN R. CRANOR, As Superintendent of the Washington State Penitentiary at Walla Walla, Washington, <i>Appellee.</i>		

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APPEAL FROM THE UNITED STATES DISTRICT  
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In the  
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In the Matter of the Application for a Writ of Habeas Corpus of FRED RAYMOND KOENIG, <i>Appellant,</i>	}	No. 12551
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APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN DISTRICT OF  
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HONORABLE SAM M. DRIVER, JUDGE

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BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

On December 18, 1948, appellant applied to the Supreme Court of the State of Washington for a writ of habeas corpus to examine into the cause of his detention in the Washington State Penitentiary on a judgment and sentence pursuant to a conviction of the crime of carnal knowledge. The petition was denied without opinion by an order of the Supreme Court in Cause No. 30869, dated

and filed January 21, 1949, with judgment entered in Journal 38 at page 460 in the office of the clerk for the Supreme Court of the State of Washington. Thereafter appellant made application in the Supreme Court of the United States for a writ of certiorari to the Supreme Court of Washington. This petition was denied June 20, 1949, *Koenig v. Smith*, 337 U. S. 942, 69 S. Ct. 1497, 93 L. Ed. 1746.

On December 16, 1949, appellant petitioned the District Court of the United States for the Eastern District of Washington for a writ of habeas corpus (Tr. 1). An order to show cause was entered (Tr. 23) and hearings were held on said order on January 4, 1950 (Tr. 46-62), and February 23 and 24, 1950 (Tr. 73-243). An order denying the writ was entered April 11, 1950 (Tr. 422). Thereafter, appellant was granted a certificate of probable cause by the District Court (Tr. 427). As authority for this appeal, appellant refers to Sections 225, 452 and 463 of former Title 28, U. S. C. (Appellant's Opening Brief, page 1). These sections were repealed by act of June 25, 1948, C. 646, § 39, 62 Stat. 992, eff. September 1, 1948, and replaced by Sections 41, 43, 1254, 1291, 1292, 1293, 1294, 2241 and 2253, New Title 28, United States Code. Appellant contends he is held in custody in violation of the Constitution of the United States (Appellant's Opening Brief, page 1), which is a proper ground for invoking the jurisdiction of the United States District Court under 28 U. S. C. 2241. However, it is appellee's position that the District Court did not have jurisdiction for the reason that appellant did not exhaust all the remedies available to him under the laws of the State of Washington as required by 28 U. S. C. 2254. This will be discussed in detail in appellee's argument in support of the order of the District Court denying the writ.

## STATEMENT OF THE CASE

Appellant is confined in the custody of appellee herein pursuant to a valid judgment of the Supreme Court of the State of Washington dated January 7, 1946, adjudging appellant guilty of the crime of carnal knowledge of a female child of 13 years and imposing as punishment therefor a maximum term of imprisonment of twenty years (Tr. 422). The substance of appellant's contentions is that he has been deprived of his liberty without due process of law. This appeal is based on what he alleges were errors occurring at his hearings in the District Court on his application for a writ of habeas corpus, which errors, he avers, are sufficient to warrant a reversal of the District Court's order denying said application. It is appellee's position that the errors assigned by appellant did not, in fact, take place or were not errors in law sufficient to justify the reversal of the order of the District Court.



## ARGUMENT

## I.

**The District Court did not have jurisdiction to entertain appellant's application for a writ of habeas corpus because appellant had not exhausted his state remedies at the time of petitioning for a writ of habeas corpus in the District Court.**

Federal courts do not have the power to grant an application for a writ of habeas corpus on behalf of a person detained pursuant to a judgment of a state court until such person has exhausted his remedies in the courts of the state before making application in a court of the United States. 28 U. S. C. 2254 provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

The certificate of the deputy clerk of the Washington State Supreme Court (Tr. 406-407) states that appellant applied to the Supreme Court of the State of Washington on two occasions for a writ of habeas corpus. An application was made to the United States Supreme Court for a writ of certiorari to the Washington State Supreme Court on the latter of the above mentioned petitions. The petition for certiorari was denied by the Supreme Court of the United States on June 20, 1949. The records of the

Washington State Supreme Court as certified by the deputy clerk of said court disclose that the appellant made no appeal from his conviction in the criminal cause and disclose that no appeal was taken from any order of a superior court denying appellant's application for a writ of error *coram nobis*. This court has held in the cases of *Barton v. Smith*, 162 F. (2d) 330, and *Hampson v. Smith*, 162 F. (2d) 334, that a person confined in the State of Washington pursuant to a judgment of a court of the state must seek relief by applying for a writ of error *coram nobis* to the state court even though the precise ambit of the writ has not been marked by the Washington Court. A writ of error *coram nobis* is thus considered to be a remedy available to persons confined in the State of Washington within the meaning of 28 U. S. C. 2254. Appellant claims that the laws of the State of Washington are inadequate to protect his rights because the courts of the state refuse to follow the state law in respect to appellant (Appellant's Opening Brief, page 2).

Impliedly, appellant admits that there is not an absence of available state corrective process, but insists that circumstances exist which render such process ineffective to protect his individual rights. However, the record discloses no circumstances justifying this contention. The state procedure being adequate and available, the failure of appellant to apply for a writ of error *coram nobis* or to appeal a denial of such a writ to the Washington State Supreme Court must bar such appellant from applying for a writ of habeas corpus in a federal district court.

## II.

**Each of Appellant's Specifications of Error is not supported by the record or does not state facts sufficient to reverse the order of the District Court.**

Appellant has assigned a number of errors as grounds for reversing the order of the District Court. (Appellant's Opening Brief, pages 6 and 7.) Appellee will consider each of these specifications in order.

1. Appellant contends that the court erred in "refusing to hear testimony concerning what actually had transpired before the Superior Court of the State of Washington" on appellant's trial. Appellee denies that the court refused to hear any testimony in regard to the matters which occurred at the trial. As to these matters, the appellant testified on his own behalf at the hearing in the District Court (Tr. 103-135). He was permitted to give this testimony in narrative form (Tr. 103) and was assisted by the court and by his attorney in completely and adequately presenting the subject of such allegations. Appellant also called and examined ten witnesses in regard to the criminal trial proceedings.

2. Appellant alleges that the court erred in "refusing to allow appellant to hear the full proceedings had in his own behalf." Appellee denies that the court refused to allow appellant to hear the complete proceedings at his hearings in the District Court. Appellant was present at all times during said hearings (Tr. 46-62, 73-243). Presumably appellant alludes in this specification to the remarks made to counsel for appellant and counsel for appellee (Tr. 183-185). The error, if such it be, is not reversible.

3. Appellant contends that the court erred in allowing certificates of Judges Barnett and Willis to be

admitted in evidence, and alleges that "appellant was denied the opportunity to offer their oral testimony." Appellee denies that the court erred in admitting such certificates. 28 U. S. C. 2245 provides in part:

"On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. \* \* \*"

Appellant was granted permission to propound interrogatories to the certifying judges in the manner provided for interrogation under 28 U. S. C. 2246 (Tr. 81, 82, 225, 226, 412, 413). While he did not take advantage of this opportunity, this method of examination was available to him.

4. Appellant alleges that the court erred in "refusing to hear witnesses subpoenaed by and offered in behalf of appellant." Appellee denies that the District Court refused to hear any witnesses offered in behalf of appellant. This specification of error presumably refers to a circumstance which allegedly existed at appellant's trial in the superior court of the State of Washington in Yakima County (Tr. 55). An examination of the record of the trial proceedings fails to show that this irregularity or misconduct did occur. Moreover, the certificate of the deputy prosecuting attorney states that appellant had an opportunity to call any and all witnesses that he so desired (Tr. 375).

5. Appellant alleges that the court erred in "erroneously advising appellant that he did not desire the file cluttered up with petitions filed by appellant in other courts, then allowing appellee's counsel to offer a petition of certiorari in evidence." Appellee maintains that the

court did not err in admitting such petitions in evidence. Appellant stated that he had no objection to the admission of a copy of the petition for certiorari to the Washington State Supreme Court (Tr. 220). The receipt of evidence admitted without objection may not be raised as a ground for error on appeal.

6. Appellant alleges that the court erred in "forcing appellant to address his deputy prosecuting attorney, counsel appointed for the defense in the original action against him, as a judge upon examination." Appellee denies that the court erred in this respect. This specification presumably refers to the suggestion by the District Court that appellant proceed with the courtesy due state judges in his examination of Judge MacIver as a witness (Tr. 84, lines 18-19).

7. Appellant alleges that the court erred in "failing to consider the fact that appellant had fully carried his burden overwhelmingly in supporting his claims undisputed set out in appellant's petition and affidavit," and that the court erred in "failing to consider the fact that appellant had introduced new and undisputed evidence in support of claims not set out in the petition and affidavit." Appellee denies that the court erred in these respects. An examination of the evidence and testimony at the hearing below indicates that appellant has completely failed to establish any of his allegations in regard to violation of his constitutional rights. On the contrary, his unsupported statements to this effect were contradicted without exception by such evidence and testimony.

8. Appellant alleges that the court erred in "denying appellant's petition for a writ of habeas corpus alleging a judgment of the Superior Court when the transcript and statement record is totally silent of any evidence of a

judgment on behalf of the appellee and appellant urged no valid judgment." Appellee maintains that the court did not err in holding that appellant was held in custody pursuant to a valid judgment of the Superior Court of the State of Washington for Yakima County. Although there is no copy of the judgment and sentence of the criminal cause of the trial court, appellant's affidavit to the Supreme Court of the United States( Tr. 388-398) admits the existence of such judgment and sentence (Tr. 389).

9. Appellant alleges that the court erred in "failing to enter a finding of conclusions of law and fact on appellant's petition." Appellee denies that the court erred in this respect. The findings of fact and conclusions of law are set forth in the order of the District Court denying the petition (Tr. 422-423).

10. Appellant alleges that the court erred in "failing to grant the rehearing of petitioner and refusing to hear evidence claimed." Appellee contends that the court did not err in this respect. Appellant's petition for a rehearing failed to allege sufficient grounds for granting such rehearing (Tr. 423-425).

11. Appellant alleges the court erred in "failing to grant appellant an order to conduct research of authorities." Appellee denies that the court erred in this respect. It is sufficient to state that the order (Tr. 432-433) denying appellant's motion (Tr. 431-432) to be taken daily to a law library does not constitute error.

## CONCLUSION

The order of the District Court should be affirmed for the following reasons:

The District Court was without jurisdiction to entertain an application for a writ of habeas corpus by this appellant inasmuch as this appellant has failed to exhaust the remedies available to him under the laws of the State of Washington, in particular that appellant has failed to apply for a writ of error *coram nobis* in the Supreme Court of the state; appellant has failed to allege that there is an absence of available state corrective process or shown the existence of circumstances rendering such process ineffective to protect his rights.

Appellant has failed to allege any errors of the District Court supported by the record which warrants a reversal of that court's order denying appellant's application for a writ of habeas corpus. Appellee prays that said order be affirmed.

Respectfully submitted,

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No. 12553

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United States  
Court of Appeals  
for the Ninth Circuit.

---

ARNOLD ENRIQUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Appeal from the United States District Court  
District of Arizona.

**FILED**

OCT - 4 1950

PAUL P. O'BRIEN,  
CLERK



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In the District Court of the United States  
for the District of Arizona

No. C-8658 Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARTURO C. LEYVAS, ARNOLD ENRIQUEZ,  
RAY C. LEYVAS, CONNIE DUARTE,  
ARTURO E. JEREZ, and JOE MARTINEZ,  
Defendants.

### INDICTMENT

Violations: 21 U.S.C.A. 174 and 26 U.S.C.A. 2554(a) (Importation, concealment, transportation and sale of Narcotic Drugs); and 18 U.S.C.A. 88 (1946 Ed) and 18 U.S.C.A. 371 (Conspiracy to violate 21 U.S.C.A. 174 and 26 U.S.C.A. 2554(a)).

The Grand Jury Charges:

Count One  
(21 U.S.C.A. 174)

That on or about the 16th day of February, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo E. Jerez, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 160 grains of prepared smoking opium.

## Count Two

That on or about the 16th day of February, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo E. Jerez, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 160 grains of prepared smoking opium, which said prepared smoking opium said defendant then and there well knew had been imported into the United States of America contrary to law.

## Count Three

(26 U.S.C.A. 2554(a))

That on or about the 16th day of February, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo E. Jerez, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Viron A. Elkins a certain quantity of prepared smoking opium, to-wit, approximately 160 grains of prepared smoking opium, at one time, which said sale was not made in pursuance of a written order of the said Viron A. Elkins to the said Arturo E. Jerez, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554 (a).

## Count Four

(21 U.S.C.A. 174)

That on or about the 28th day of February, 1948, within the District of Arizona, County of Maricopa,

the defendant, Arturo E. Jerez, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 517 grains of prepared smoking opium.

#### Count Five

That on or about the 28th day of February, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo E. Jerez, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 517 grains of prepared smoking opium, which said prepared smoking opium said defendant then and there well knew had been imported into the United States of America contrary to law.

#### Count Six

(26 U.S.C.A. 2554(a))

That on or about the 28th day of February, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo E. Jerez, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Viron A. Elkins a certain quantity of prepared smoking opium, to-wit, approximately 517 grains of prepared smoking opium, at one time, which said sale was not made in pursuance of a written order of the said Viron A. Elkins to the said Arturo E. Jerez, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Seven  
(21 U.S.C.A. 174)

That on or about the 1st day of May, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo E. Jerez, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 517 grains of prepared smoking opium.

Count Eight

That on or about the 1st day of May, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo E. Jerez, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 517 grains of prepared smoking opium, which said prepared smoking opium said defendant then and there well knew had been imported into the United States of America contrary to law.

Count Nine  
(26 U.S.C.A. 2554(a))

That on or about the 1st day of May, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo E. Jerez, did then and there unlawfully, fraudulently and feloniously sell, distribute and give away to one Viron A. Elkins a certain quantity of prepared smoking opium, to wit, approximately 517 grains of prepared smoking opium,

defendant then and there well knew had been imported into the United States of America contrary to law.

Count Fifteen  
(26 U.S.C.A. 2554(a))

That on or about the 19th day of August, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo E. Jerez, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Viron A. Elkins a certain quantity of prepared smoking opium, to-wit, approximately 14,583 grains of prepared smoking opium, at one time, which said sale was not made in pursuance of a written order of the said Viron A. Elkins to the said Arturo E. Jerez, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Sixteen  
(21 U.S.C.A. 174)

That on or about the 3rd day of October, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo E. Jerez, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 693 grains of prepared smoking opium.

Count Seventeen

That on or about the 3rd day of October, 1948, defendant then and there well knew had been im-

the defendant, Arturo E. Jerez, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment after unlawful importation thereof, of approximately 693 grains of prepared smoking opium, which said prepared smoking opium said defendant then and there well knew had been imported into the United States of America contrary to law.

Count Eighteen  
(26 U.S.C.A. 2554(a))

That on or about the 3rd day of October, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo E. Jerez, did unlawfully, fraudulently and feloniously sell, distribute and give to one Okla W. Johnson a certain quantity of prepared smoking opium, to-wit, approximately 693 grains of prepared smoking opium, at one time, which said sale was not made in pursuance of a written order of the said Okla W. Johnson to the said Arturo E. Jerez, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Nineteen  
(21 U.S.C.A. 174)

On or about the 10th day of October, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo E. Jerez, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so

doing, approximately 351 grains of prepared smoking opium.

Count Twenty

That on or about the 10th day of October, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo E. Jerez, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 351 grains of prepared smoking opium, which said prepared smoking opium said defendant then and there well knew had been imported into the United States of America contrary to law.

Count Twenty-One  
(26 U.S.C.A. 2554(a))

That on or about the 10th day of October, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo E. Jerez, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Okla W. Johnson a certain quantity of prepared smoking opium, to-wit, approximately 351 grains of prepared smoking opium, at one time, which said sale was not made in pursuance of a written order of the said Okla W. Johnson to the said Arturo E. Jerez, on a form issued in blank for that purpose by Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).



## Count Twenty-Two

(21 U.S.C.A. 174)

That on or about the 29th day of October, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did then and there knowing and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 2,447 grains of prepared smoking opium.

## Count Twenty-Three

That on or about the 29th day of October, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 2,447 grains of prepared smoking opium, which said prepared smoking opium said defendant then and there well knew had been imported into the United States of America contrary to law.

## Count Twenty-Four

(26 U.S.C.A. 2554(a))

That on or about the 29th day of October, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Frank W. Colbert a certain quantity of prepared smoking opium, to-wit, approximately 2,447 grains of prepared smoking opium, at one time, which said sale was not made in pursu-

ance of a written order of the said Frank W. Colbert to the said Arturo C. Leyvas, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Twenty-Five  
(21 U.S.C.A. 174)

That on or about the 5th day of November, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 10,192 grains of prepared smoking opium.

Count Twenty-Six

That on or about the 5th day of November, 1948, within the District of Arizona, County of Maricopa, the defendant Arturo C. Leyvas, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment after unlawful importation thereof, of approximately 10,192 grains of prepared smoking opium, which said prepared smoking opium said defendant then and there well knew had been imported into the United States of America contrary to law.

Count Twenty-Seven  
(26 U.S.C.A. 2554(a))

That on or about the 5th day of November, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did unlawfully,

fraudulently and feloniously sell, distribute and give away to one Okla W. Johnson a certain quantity of prepared smoking opium, to-wit, approximately 10,192 grains of prepared smoking opium, at one time, which said sale was not made in pursuance of a written order of the said Okla W. Johnson to the said Arturo C. Leyvas, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States of America, as required by virtue of 26 U.S.C.A. 2554(a).

Count Twenty-Eight  
(21 U.S.C.A. 174)

That on or about the 11th day of November, 1948, within the District of Arizona, County of Maricopa, the defendant, Connie Duarte, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately  $15\frac{3}{4}$  grains of a morphine derivative, namely, heroin hydrochloride.

Count Twenty-Nine

That on or about the 11th day of November, 1948, within the District of Arizona, County of Maricopa, the defendant, Connie Duarte, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately  $15\frac{3}{4}$  grains of a morphine derivative, namely, heroin hydrochloride, which said heroin hydrochloride said defendant then and there well

knew had been imported into the United States of America contrary to law.

Count Thirty  
(26 U.S.C.A. 2554(a))

That on or about the 11th day of November, 1948, within the District of Arizona, County of Maricopa, the defendant, Connie Duarte, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Frank W. Colbert a certain quantity of a morphine derivative, namely heroin hydrochloride, to-wit, approximately  $15\frac{3}{4}$  grains of heroin hydrochloride, at one time, which said sale was not made in pursuance of a written order of the said Frank W. Colbert to the said Connie Duarte, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Thirty-One  
(21 U.S.C.A. 174)

That on or about the 14th day of November, 1948, within the District of Arizona, County of Maricopa, the defendant, Connie Duarte, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 118 grains of a morphine derivative, namely, heroin hydrochloride.

Count Thirty-Two

That on or about the 14th day of November, 1948, within the District of Arizona, County of Maricopa,

the defendant, Connie Duarte, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 118 grains of a morphine derivative, namely, heroin hydrochloride, which said heroin hydrochloride said defendant then and there well knew had been imported into the United States of America contrary to law.

Count Thirty-Three  
(26 U.S.C.A. 2554(a))

That on or about the 14th day of November, 1948, within the District of Arizona, County of Maricopa, the defendant, Connie Duarte, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Okla W. Johnson a certain quantity of a morphine derivative, namely heroin hydrochloride, to-wit, approximately 118 grains of heroin hydrochloride, at one time, which said sale was not made in pursuance of a written order of the said Okla W. Johnson to the said Connie Duarte, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Thirty-Four  
(21 U.S.C.A. 174)

That on or about the 17th day of November, 1948, within the District of Arizona, County of Maricopa, the defendants Arturo C. Leyvas and Connie Duarte, did then and there knowingly, and fraudu-

lently, contrary to law, import and bring into the United States, and assist in so doing, approximately 381 grains of a morphine derivative, namely, heroin hydrochloride.

#### Count Thirty-Five

That on or about the 17th day of November, 1948, within the District of Arizona, County of Maricopa, the defendants Arturo C. Leyvas and Connie Duarte, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 381 grains of a morphine derivative, namely, heroin hydrochloride, which said heroin hydrochloride said defendants then and there well knew had been imported into the United States of America contrary to law.

#### Count Thirty-Six (26 U.S.C.A. 2554(a))

That on or about the 17th day of November, 1948, within the District of Arizona, County of Maricopa, the defendants Arturo C. Leyvas and Connie Duarte, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Okla W. Johnson a certain quantity of a morphine derivative, namely heroin hydrochloride, to-wit, approximately 381 grains of heroin hydrochloride, at one time, which said sale was not made in pursuance of a written order of the said Okla W. Johnson to the said Arturo C. Leyvas and Connie Duarte, or either of them, on a form issued in blank for that purpose



by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Thirty-Seven

(21 U.S.C.A. 174)

That on or about the 16th day of December, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States and assist in so doing, approximately 2½ grains of an opium derivative, namely, morphine hydrochloride.

Count Thirty-Eight

That on or about the 16th day of December, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 2½ grains of an opium derivative, namely, morphine hydrochloride, which said morphine hydrochloride said defendant then and there well knew had been imported into the United States of America contrary to law.

Count Thirty-Nine

(26 U.S.C.A. 2554(a))

That on or about the 16th day of December, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did unlawfully, fraudulently and feloniously sell, distribute and



give away to one Viron A. Elkins a certain quantity of an opium derivative, namely morphine hydrochloride, to-wit, approximately 21½ grains of morphine hydrochloride, at one time, which said delivery was not made in pursuance of a written order of the said Viron A. Elkins to the said Arturo C. Leyvas, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virute of 26 U.S.C.A. 2554(a).

Count Forty  
(21 U.S.C.A. 174)

That on or about the 16th day of December, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 378 grains of a morphine derivative, namely, heroin hydrochloride.

Count Forty-One

That on or about the 16th day of December, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 378 grains of a morphine derivative, namely, heroin hydrochloride, which said heroin hydrochloride said defendant then and there well knew had been imported into the United States of America contrary to law.

Count Forty-Two  
(26 U.S.C.A. 2554(a))

That on or about the 16th day of December, 1948, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Viron A. Elkins a certain quantity of a morphine derivative, namely heroin hydrochloride, to-wit, approximately 378 grains of heroin hydrochloride, at one time, which said sale was not made in pursuance of a written order of the said Viron A. Elkins to the said Arturo C. Leyvas, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Forty-Three  
(21 U.S.C.A. 174)

That on or about the 8th day of January, 1949, within the District of Arizona, County of Maricopa, the defendant, Joe Martinez, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 179 grains of prepared smoking opium.

Count Forty-Four

That on or about the 8th day of January, 1949, within the District of Arizona, County of Maricopa, the defendant, Joe Martinez, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and con-

cealment, after unlawful importation thereof, of approximately 179 grains of prepared smoking opium, which said prepared smoking opium said defendant then and there well knew had been imported into the United States of America contrary to law.

Count Forty-Five  
(26 U.S.C.A. 2554(a))

That on or about the 8th day of January, 1949, within the District of Arizona, County of Maricopa, the defendant, Joe Martinez, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Charles Cobos a certain quantity of prepared smoking opium, to-wit, approximately 179 grains of prepared smoking opium, at one time, which said sale was not made in pursuance of a written order of the said Charles Cobos to the said Joe Martinez, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Forty-Six  
(21 U.S.C.A. 174)

That on or about the 14th day of January, 1949, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately  $5\frac{1}{4}$  grains of an opium derivative, namely, morphine hydrochloride.

## Count Forty-Seven

That on or about the 14th day of January, 1949, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately  $5\frac{1}{4}$  grains of an opium derivative, namely morphine hydrochloride, which said morphine hydrochloride said defendant then and there well knew had been imported into the United States of America contrary to law.

## Count Forty-Eight

(26 U.S.C.A. 2554(a))

That on or about the 14th day of January, 1949, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Viron A. Elkins a certain quantity of an opium derivative, namely, morphine hydrochloride, to wit, approximately  $5\frac{1}{4}$  grains of morphine hydrochloride, at one time, which said delivery was not made in pursuance of a written order of the said Viron A. Elkins to the said Arturo C. Leyvas, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of the 26 U.S.C.A. 2554(a).

Count Forty-Nine  
(21 U.S.C.A. 174)

That on or about the 14th day of January, 1949, within the District of Arizona, County of Maricopa, the defendant, Aruro C. Leyvas, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 235 grains of prepared smoking opium.

Count Fifty

That on or about the 14th day of January, 1949, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did then and there there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 235 grains of prepared smoking opium, which said prepared smoking opium said defendant than and there well knew had been imported into the United States of America contrary to law.

Count Fifty-One  
(26 U.S.C.A. 2554(a))

That on or about the 14th day of January, 1949, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Viron A. Elkins a certain quantity of prepared smoking opium, to wit, approximately 235 grains of prepared smoking opium, at one time, which said sale was not made in pursuance of a written order of the said Viron A. Elkins to the

said Arturo C. Leyvas, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Fifty-Two  
(21 U.S.C.A. 174)

That or about the 14th day of January, 1949, within the District of Arizona, County of Maricopa, the defendants, Arnold Enriquez, Arturo C. Leyvas and Arturo Jerez, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 11,229 grains of prepared smoking opium.

Count Fifty-Three

That on or about the 14th day of January, 1949, within the District of Arizona, County of Maricopa, the defendants, Arnold Enriquez, Arturo C. Leyvas and Arturo Jerez, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 11,229 grains of prepared smoking opium, which said prepared smoking opium said defendants then and there well knew had been imported into the United States of America contrary to law.

Count Fifty-Four  
(26 U.S.C.A. 2554(a))

That on or about the 14th day of January, 1949, within the District of Arizona, County of Maricopa, the defendants, Arnold Enriquez, Arturo C. Leyvas



and Arturo Jerez, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Okla W. Johnson a certain quantity of prepared smoking opium, to wit, approximately 11,229 grains of prepared smoking opium, at one time, which said sale was not made in pursuance of a written order of the said Okla W. Johnson to the said Arnold Enriquez, Arturo C. Leyvas and Arturo Jerez, or either or any of them, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Fifty-Five  
(21 U.S.C.A. 174)

That on or about the 15th day of January, 1949, within the District of Arizona, County of Maricopa, the defendant, Joe Martinez, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 235 grains of prepared smoking opium.

Count Fifty-Six

That on or about the 15th day of January, 1949, within the District of Arizona, County of Maricopa, the defendant, Joe Martinez, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 235 grains of prepared smoking opium, which said prepared smoking opium said defend-



ant then and there well knew had been imported into the United States of America contrary to law.

Count Fifty-Seven  
(26 U.S.C.A. 2554(a))

That on or about the 15th day of January, 1949, within the District of Arizona, County of Maricopa, the defendant, Joe Martinez, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Charles Cobos a certain quantity of prepared smoking opium, to wit, approximately 235 grains of prepared smoking opium, at one time, which said sale was not made in pursuance of a written order of the said Charles Cobos to the said Joe Martinez, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Fifty-Eight  
(21 U.S.C.A. 174)

That on or about the 29th day of January, 1949, within the District of Arizona, County of Maricopa, the defendant, Joe Martinez, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 2,625 grains of prepared smoking opium.

Count Fifty-Nine

That on or about the 29th day of January, 1949, within the District of Arizona, County of Maricopa, the defendant, Joe Martinez, did then and there

knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 2,625 grains of prepared smoking opium, which said prepared smoking opium said defendant then and there well knew had been imported into the United States of America contrary to law.

Count Sixty  
(26 U.S.C.A. 2554(a))

That on or about the 29th day of January, 1949, within the District of Arizona, County of Maricopa, the defendant, Joe Martinez, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Okla W. Johnson a certain quantity of prepared smoking opium, to wit, approximately 2,625 grains of prepared smoking opium, at one time, which said sale was not made in pursuance of a written order of the said Okla W. Johnson to the said Joe Martinez, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Sixty-One  
(21 U.S.C.A. 174)

That on or about the 2nd day of February, 1949, within the District of Arizona, County of Maricopa, the defendant, Connie Duarte, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in

so doing, approximately 287 grains of prepared smoking opium.

Count Sixty-Two

That on or about the 2nd day of February, 1949, within the District of Arizona, County of Maricopa, the defendant, Connie Duarte, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 287 grains of prepared smoking opium, which said prepared smoking opium said defendant then and there well knew had been imported into the United States of America contrary to law.

Count Sixty-Three  
(26 U.S.C.A. 2554(a))

That on or about the 2nd day of February, 1949, within the District of Arizona, County of Maricopa, the defendant, Connie Duarte, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Viron A. Elkins a certain quantity of prepared smoking opium, to wit, approximately 287 grains of prepared smoking opium, at one time, which said sale was not made in pursuance of a written order of the said Viron A. Elkins to the said Connie Duarte, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Sixty-Four  
(21 U.S.C.A. 174)

That on or about the 6th day of February, 1949, within the District of Arizona, County of Maricopa, the defendants, Joe Martinez and Arnold Enriquez, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 145 grains of prepared smoking opium.

Count Sixty-Five

That on or about the 6th day of February, 1949, within the District of Arizona, County of Maricopa, the defendants, Joe Martinez and Arnold Enriquez, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 145 grains of prepared smoking opium, which said prepared smoking opium said defendants then and there well knew had been imported into the United States of America contrary to law.

Count Sixty-Six  
(26 U.S.C.A. 2554(a))

That on or about the 6th day of February, 1949, within the District of Arizona, County of Maricopa, the defendants, Joe Martinez and Arnold Enriquez, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Charles Cobos a certain quantity of prepared smoking opium, to wit,

approximately 145 grains of prepared smoking opium, at one time, which said sale was not made in pursuance of a written order of the said Charles Cobos to the said Joe Martinez and Arnold Enriquez, or either of them, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Sixty-Seven  
(21 U.S.C.A. 174)

That on or about the 8th day of February, 1949, within the District of Arizona, County of Maricopa, the defendants, Arnold Enriquez, Arturo C. Leyvas and Joe Martinez, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 145 grains of prepared smoking opium.

Count Sixty-Eight

That on or about the 8th day of February, 1949, within the District of Arizona, County of Maricopa, the defendants, Arnold Enriquez, Arturo C. Leyvas and Joe Martinez, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 145 grains of prepared smoking opium, which said prepared smoking opium said defendants then and there well knew had been imported into the United States of America contrary to law.

Count Sixty-Nine  
(26 U.S.C.A. 2554(a))

That on or about the 8th day of February, 1949, within the District of Arizona, County of Maricopa, the defendants, Arnold Enriquez, Arturo C. Leyvas and Joe Martinez, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Charles Cobos a certain quantity of prepared smoking opium, to wit, approximately 145 grains of prepared smoking opium, at one time, which said sale was not made in pursuance of a written order of the said Charles Cobos to the said Arnold Enriquez, Arturo C. Leyvas and Joe Martinez, or either or any of them, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Seventy  
(21 U.S.C.A. 174)

That on or about the 8th day of February, 1949, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 188 grains of prepared smoking opium.

Count Seventy-One

That on or about the 8th day of February, 1949, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did then and there

knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 188 grains of prepared smoking opium, which said prepared smoking opium said defendant then and there well knew had been imported into the United States of America contrary to law.

Count Seventy-Two  
(26 U.S.C.A. 2554(a))

That on or about the 8th day of February, 1949, within the District of Arizona, County of Maricopa, the defendant, Arturo C. Leyvas, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Viron A. Elkins a certain quantity of prepared smoking opium, to wit, approximately 188 grains of prepared smoking opium, at one time, which said sale was not made in pursuance of a written order of the said Viron A. Elkins to the said Arturo C. Leyvas, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Seventy-Three  
(21 U.S.C.A. 174)

That on or about the 14th day of February, 1949, within the District of Arizona, County of Maricopa, the defendant, Connie Duarte, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in



so doing, approximately  $1\frac{3}{4}$  grains of a morphine derivative, namely, heroin hydrochloride.

Count Seventy-Four

That on or about the 14th day of February, 1949, within the District of Arizona, County of Maricopa, the defendant, Connie Duarte, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately  $1\frac{3}{4}$  grains of a morphine derivative, namely, heroin hydrochloride, which said heroin hydrochloride said defendant then and there well knew had been imported into the United States of America contrary to law.

Count Seventy-Five  
(26 U.S.C.A. 2554(a))

That on or about the 14th day of February, 1949, within the District of Arizona, County of Maricopa, the defendant, Connie Duarte, did unlawfully, fraudulently and feloniously sell, distribute and give away to one Viron A. Elkins a certain quantity of a morphine derivative, namely, heroin hydrochloride, to wit, approximately  $1\frac{3}{4}$  grains of heroin hydrochloride, at one time, which said delivery was not made in pursuance of a written order of the said Viron A. Elkins to the said Connie Duarte, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of 26 U.S.C.A. 2554(a).

Count Seventy-Six  
(21 U.S.C.A. 174)

That on or about the 15th day of February, 1949, within the District of Arizona, County of Maricopa, the defendant, Ray C. Leyvas, did then and there knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 24 grains of prepared smoking opium, and approximately 15 grains of an opium derivative, namely, yen shee.

Count Seventy-Seven

That on or about the 15th day of February, 1949, within the District of Arizona, County of Maricopa, the defendant, Ray C. Leyvas, did then and there knowingly, feloniously and fraudulently receive, conceal and facilitate the transportation and concealment, after unlawful importation thereof, of approximately 24 grains of prepared smoking opium, and approximately 15 grains of an opium derivative, namely, yen shee, which said prepared smoking opium and yen shee said defendant then and there well knew had been imported into the United States of America contrary to law.

Count Seventy-Eight  
(18 U.S.C.A. 88 (1946 Ed.) and 18 U.S.C.A. 371)

1. That in the month of February, 1948, and continuing thereafter until on or about the 16th day of February, 1949, in the County of Maricopa, Arizona, and within the District of Arizona, and

at other places to the Grand Jurors unknown, the said defendants, Arturo C. Leyvas, Arnold Enriquez, Ray C. Leyvas, Connie Duarte, Arturo E. Jerez and Joe Martinez, the identical persons named as defendants in one or more of the above and foregoing seventy-seven counts of this indictment, and in this count hereinafter referred to as the conspirators, did wilfully, knowingly and feloniously conspire, combine, confederate and agree between themselves, and each other, and other persons to the Grand Jurors unknown, to commit the diverse offenses charged against said defendants in the first seventy-seven counts of this indictment preceding this count, and made offenses by Title 18 U.S.C.A. 174 and Title 26 U.S.C.A. 2554(a), the allegations of which seventy-seven counts of this indictment are incorporated in this count by reference as fully as if they were herein repeated.

2. That the object of said conspiracy was knowingly, unlawfully, wilfully and fraudulently, in said District of Arizona, to import and bring into the United States, and cause to be imported and brought into the United States, prepared smoking opium, morphine hydrochloride (an opium derivative), heroin hydrochloride (a morphine derivative) and yen shee (an opium derivative,) and to wilfully and fraudulently receive, conceal and facilitate the transportation and concealment, after the unlawful importation thereof, of the above-named narcotic drugs; and further, to unlawfully, fraudulently and feloniously sell, distribute and give away to diverse persons, certain quantities of the said narcotic

drugs, not in pursuance of written orders from the transferees to the said conspirators, on forms issued in blank for that purpose by the Secretary of the Treasury of the United States as required by virtue of Title 26 U.S.C.A. 2554(a); that in furtherance of said conspiracy and to effect the object thereof, the said conspirators did, among others, commit the following overt acts, to wit:

(a) That at the time and place as alleged in each of the first seventy-seven counts of this indictment, each of the said conspirators committed the offense charged against said conspirators in each of said counts, in the manner charged therein, the allegations concerning which in said counts are hereby incorporated by reference thereto in this count as fully and with like effect, for all purposes, as though the same were here reiterated and repeated.

(b) That on or about February 15, 1948, at Tempe, Arizona, the conspirator, Arturo Jerez, offered to sell one Viron A. Elkins prepared smoking opium.

(c) That on or about December 15, 1948, at Phoenix, Arizona, conspirator Ray Leyvas had a conversation with one Viron A. Elkins.

(d) That on or about December 15, 1948, at Phoenix, Arizona, conspirator Ray Leyvas told one Viron A. Elkins that he thought he could get the said Viron A. Elkins an ounce of heroin.

(e) That on or about the 16th day of December, 1948, at Tempe, Arizona, the conspirator Ray Leyvas informed the said Viron A. Elkins that he would bring the heroin to him about 5:30 p.m. that day.

(f) That on or about the 16th day of December, 1948, at Tempe, Arizona, conspirator Ray Leyvas, in company with conspirators Connie Duarte and Arturo C. Leyvas, introduced the said Arturo C. Leyvas to the said Viron A. Elkins as his brother.

(g) That on or about the 16th day of December, 1948, at Tempe, Arizona, conspirator Arturo C. Leyvas delivered to the said Viron A. Elkins a capsule containing white powder.

(h) That on or about January 8, 1949, at Phoenix, Arizona, conspirator Arnold Enriquez told one Charles Cobos that he would deliver to him a small jar of smoking opium for the price of \$50.00.

(i) That on or about January 8, 1949, at Phoenix, Arizona, conspirator Joe Martinez, at the request of conspirator Arnold Enriquez, delivered to the said Charles Cobos a small jar of prepared smoking opium.

(j) That on or about January 12, 1949, at Phoenix, Arizona, conspirator Arnold Enriquez told one Frank W. Colbert that "I would like to take care of you but there isn't any stuff in town. Art is out of town now to bring in a

load and he will be here on Friday but until he comes back there is no stuff here.”

A True Bill.

/s/ W. L. ALLISON,

Foreman.

/s/ FRANK E. FLYNN,

United States Attorney,

for the District of Arizona.

[Endorsed]: Filed June 16, 1949.

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In the United States District Court  
for the District of Arizona

MINUTE ENTRY OF MONDAY,  
NOVEMBER 21, 1949

Honorable Dave W. Ling, United States District  
Judge, Presiding.

[Title of Cause.]

This case comes on regularly for arraignment this day. The defendants are all present in person with their counsel George T. Wilson and are now duly arraigned. The defendants waive the reading of the indictment and a copy thereof is handed to each of them. Each of the defendants pleads not guilty and said pleas are now duly entered.

It Is Ordered that this case be and it is set for trial Wednesday, December 28, 1949 at 10:00 o'clock a.m.

In the United States District Court  
for the District of Arizona

MINUTE ENTRY OF MONDAY,  
DECEMBER 19, 1949

Honorable Dave W. Ling, United States District  
Judge, Presiding.

[Title of Cause.]

Motion of Defendant Ray C. Leyvas to Suppress the Use of Evidence comes on regularly for hearing this date. Frank E. Flynn, Esquire, United States Attorney and E. R. Thurman, Esquire, Assistant United States Attorney appear for the Government George T. Wilson, Esquire, appears for the defendant. On agreement of counsel

It Is Ordered that the record show that said Motion to Suppress the use of Evidence is submitted without argument and taken under advisement.

Defendants Arturo C. Leyvas, Connie Duarte, Arturo M. Jerez and Joe Martinez, are present in person with their counsel, George T. Wilson, and each of said defendants now withdraws his plea of not guilty, heretofore entered, and pleads guilty as charged in the indictment, which pleas are now duly entered.

It Is Ordered that this case be and it is set for sentence as to each of said defendants Monday, January 9, 1950, at 10:00 o'clock a.m., and that this case be referred to probation officer for report.



On motion of George T. Wilson, Esquire, and E. R. Thurman, Esquire, consenting thereto,

It Is Ordered that the order setting this case for trial December 28, 1949, be and it is vacated as to defendants Ray C. Leyvas and Arnold Enriquez, and that this case be and it is set for trial April 26, 1950, at 10:00 o'clock a.m., as to said defendants.

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In the United States District Court  
for the District of Arizona

MINUTE ENTRY OF WEDNESDAY,  
APRIL 26, 1950

Honorable Dave W. Ling, United States District  
Judge, Presiding.

[Title of Cause.]

This case comes on regularly for trial this date as to the defendants Ray C. Leyvas and Arnold Enriquez. E. R. Thurman, Esquire, Assistant United States Attorney appears for the Government.

The defendant, Ray C. Leyvas, is present in person with his counsel, George T. Wilson, Esquire, and moves for leave to withdraw his plea of not guilty to count 77 of the indictment and enter a plea of guilty thereto, It Is Ordered that said motion be granted and that a plea of guilty as charged in count 77 of the indictment be and it is accepted and entered as to said defendant Ray C. Leyvas, and that this case be set for sentence Monday, May 15, 1950, at 10:00 o'clock a.m., as to said defendant.

The defendant, Arnold Enriquez, is present in person with his counsel, Paul Primock, Esquire.

Both sides announce ready for trial.

A lawful jury of twelve persons is now duly empaneled and sworn to try this case.

It Is Ordered that all Jurors not empaneled in the trial of this case be excused until further order.

Government's Case:

The following Government's witnesses are now sworn and examined:

Redvers G. Nicholson, Viron A. Elkins.

Thereupon, at twelve o'clock noon, It Is Ordered that the further trial of this case be continued to 1:30 o'clock p.m., this date, to which time the Jury, being first duly admonished by the court, the defendant and counsel are excused.

Subsequently at 1:30 o'clock p.m., the Jury and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Government's Case Continued:

Robert W. Lorenz is now sworn and examined on behalf of the Government.

Government's Exhibit 28, photostat copy of car title and certificate of registration, is now admitted in evidence.

Okla W. Johnson is now sworn and examined on behalf of the Government.

And, thereupon, at 4:45 o'clock p.m., It Is Ordered that the further trial of this case be continued until April 27, 1950, at 10:00 o'clock a.m., to which time the Jury, being first duly admonished by the Court, the defendant and counsel are excused.

In the United States District Court  
for the District of Arizona

MINUTE ENTRY OF THURSDAY,  
APRIL 27, 1950

Honorable Dave W. Ling, United States District  
Judge, Presiding.

[Title of Cause.]

The Jury and all members thereof, the defendant and all counsel are present pursuant to recess and further proceedings of trial are had as follows:

Government's Case Continued:

Okla W. Johnson, heretofore sworn, is now recalled and further examined on behalf of the Government.

Mike Sandoval is now sworn and examined on behalf of the Government.

Viron Elkins, heretofore sworn, is now recalled and further examined on behalf of the Government.

The following Government's witnesses are now sworn and examined:

Frank W. Colbert, Earl A. Smith.

And, thereupon, at twelve o'clock noon, It Is Ordered that the further trial of this case be continued to 2:00 o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, the defendant and counsel are excused.

Subsequently at 2:00 o'clock p.m., the Jury and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

## Government's Case Continued:

Earl A. Smith, heretofore sworn, is now recalled and further examined on behalf of the Government.

Government's Exhibit 29, Judgment in Case No. C-10038 Tucson, against Arnold Enriquez, is now admitted in evidence.

Redvers G. Nicholson, heretofore sworn, is now recalled and further examined on behalf of the Government.

Jesse J. Harris is now sworn and examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

1. Envelope containing prepared smoking opium.
2. Envelope containing prepared smoking opium.
4. Envelope containing prepared smoking opium.
5. Envelope containing prepared smoking opium.
6. Envelope containing prepared smoking opium.
7. Envelope containing prepared smoking opium.
8. Envelope containing prepared smoking opium.
9. Envelope containing morphine hydrochloride.
10. Envelope containing prepared smoking opium.
11. Envelope containing heroin hydrochloride.
12. Envelope containing prepared smoking opium and heroin hydrochloride.
13. Envelope containing heroin hydrochloride.
14. Envelope containing heroin hydrochloride.
15. Envelope containing heroin hydrochloride and morphine hydrochloride.
17. Envelope containing morphine hydrochloride and prepared smoking opium.
18. Envelope containing prepared smoking opium.

19. Envelope containing prepared smoking opium.
20. Envelope containing prepared smoking opium.
21. Envelope containing prepared smoking opium.
22. Envelope containing prepared smoking opium.
23. Envelope containing prepared smoking opium.
24. Envelope containing prepared smoking opium.
25. Envelope containing heroin hydrochloride.
26. Envelope containing marihuana.
27. Envelope containing smoking opium and yen shee.

Whereupon, the Government rests.

The Jury is now duly admonished by the Court and excluded from the court room at 2:30 o'clock p.m.

Counsel for defendant now moves for judgment of acquittal as to Counts 52, 53, 54, 64, 65, 66, 67, 68, 69 and 78 on account of insufficient evidence, and argues said motion to the Court.

It Is Ordered that said motion for judgment of acquittal be and it is granted as to Counts 52, 53, 54, 64, 65, 66, 67, 68 and 69, and denied as to said Count 78.

The Jury return in a body into open Court at 2:35 o'clock p.m., and further proceedings of trial had as follows:

Defendant's Case:

Arnold Enriquez is now sworn and examined in his own behalf.

Ed Marshall is now sworn and examined on behalf of the defendant.

And the defendant rests.

Both sides rest.

And, thereupon, at 3:50 o'clock p.m., It Is Ordered that the further trial of this case be continued until April 28, 1950, at 10:00 o'clock a.m., to which time the Jury, being first duly admonished by the Court, the defendant and counsel are excused.

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In the United States District Court  
for the District of Arizona

MINUTE ENTRY OF FRIDAY,  
APRIL 28, 1950

Honorable Dave W. Ling, United States District  
Judge, Presiding.

[Title of Cause.]

The Jury and all members thereof, the defendant and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

All evidence being in, the case is now argued by respective counsel to the jury.

Whereupon, the Court duly instructs the Jury and said Jury retires at 11:35 o'clock a.m., in charge of sworn bailiff to consider of their verdict.

At twelve o'clock noon, It Is Ordered that the Marshal provide noon meals for the Jury and their bailiffs during the deliberation of this case at the expense of the United States.

Subsequently at 6:10 o'clock p.m., It Is Ordered that the Marshal provide evening meals for said Jury and their bailiffs at the expense of the United States.

Subsequently, at 8:20 o'clock p.m., the defendant and all counsel being present, the Jury return in a body into open Court and request that portions of the testimony be read to them. On agreement of respective counsel, the reporter now reads portions of testimony of Government's Witness Okla W. Johnson, and of the defendant to the Jury, and said Jury retire at 8:27 o'clock p.m. in charge of their bailiff to further consider of their verdict.

Subsequently, at 10:25 o'clock p.m., the defendant and all counsel being present, the Jury return in a body into open Court and all members thereof being present, are asked if they have agreed upon a verdict. Whereupon, the Foreman reports that they have agreed and presents the following verdict, to wit:

“UNITED STATES OF AMERICA,

“Plaintiff,

“Against

“ARNOLD ENRIQUEZ,

“Defendant.

“No. C-8658 Phoenix

“VERDICT

“We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Arnold Enriquez, Guilty, as charged in Count 78 of the Indictment.

“BEN C. STOKES,

“Foreman.”



The verdict is read as recorded and on motion of counsel for the defendant, It Is Ordered that the Jury be polled. Whereupon, each juror is called by name and is asked if this is his verdict and each of said jurors answers in the affirmative. The Jury is now discharged from the further consideration of this case and excused until May 2, 1950, at 10:00 o'clock p.m.

It is Ordered that this case be and it is set for judgment and sentence Monday, May 8, 1950, at 10:00 o'clock a.m., and that the defendant be committed to the custody of the Marshal and that his bond be exonerated.

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United States District Court,  
District of Arizona  
No. C-8658 Phoenix

UNITED STATES OF AMERICA,  
Plaintiff,  
Against

ARNOLD ENRIQUEZ,  
Defendant.

### VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Arnold Enriquez, guilty, as charged in Count 78 of the Indictment.

/s/ BEN C. STOKES,  
Foreman.

[Endorsed]: Filed April 28, 1950.

[Title of District Court and Cause.]

## MOTION FOR JUDGMENT OF ACQUITTAL

Without waiving defendant's motion for new trial and expressly relying thereon, but in the alternative the defendant moves for judgment of acquittal previously made at the conclusion of the government's case and at the conclusion of all evidence for the following reasons:

1. That there was no evidence whatsoever to show that this defendant and the co-defendants entered into an agreement for the receiving, concealing, transportation and importation of narcotic drugs.

2. That there was no evidence whatsoever to show that this defendant and the co-defendants entered into an agreement to sell, distribute or give away certain quantities of narcotic drugs not in pursuance of written orders on forms issued by the Secretary of the Treasury.

Dated at Phoenix, Arizona, this 1st day of May, 1950.

/s/ PAUL H. PRIMOCK,  
Attorney for Defendant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed May 1, 1950.

[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying Motion for an Acquittal made at the conclusion of the government's evidence.

2. The Court erred in denying the defendant's Motion for Acquittal made at the conclusion of all evidence.

3. The verdict is contrary to the weight of the evidence.

4. The verdict is not supported by substantial evidence.

5. The Court erred in permitting the introduction into evidence over the objection of the defendant, Exhibits 1 and 2, 4 through 15, inclusive, and 17 through 29, inclusive.

6. The Court erred in admitting testimony of the witness Viron Elkins to which objections were made by the defendant.

7. The Court erred in admitting testimony of the witness Robert Lorenz to which objections were made by the defendant.

8. The Court erred in admitting testimony of the witness Okla. Johnson to which objections were made by the defendant.

9. The Court erred in admitting testimony of the witness Mike Sandoval to which objections were made by the defendant.

10. The Court erred in admitting testimony of the witness Frank Colbert to which objections were made by the defendant.

11. The Court erred in admitting testimony of the witness Earl Smith to which objections were made by the defendant.

12. The Court erred in admitting testimony of the witness Ed Marshall to which objections were made by the defendant.

Dated at Phoenix, Arizona, this 1st day of May, 1950.

/s/ PAUL H. PRIMOCK,  
Attorney for Defendant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed May 1, 1950.

In the United States District Court  
for the District of Arizona

MINUTE ENTRY OF MONDAY,  
MAY 8, 1950

Honorable Dave W. Ling, United States District  
Judge, Presiding.

[Title of Cause.]

This case comes on regularly for judgment and sentence this date. E. R. Thurman, Esquire, Assistant United States Attorney, appears for the Government. The defendant, Arnold Enriquez, is present in person with his counsel, Paul Primock, Esquire. The defendant's Motion for New Trial is now argued by respective counsel and submitted to the Court, and

It is Ordered that this case be continued for judgment and sentence, and for ruling on said motion until Monday, May 15, 1950, at 10:00 o'clock a.m.

In the United States District Court for the  
District of Arizona

Minute Entry of Monday, May 15, 1950

Honorable Dave W. Ling, United States District  
Judge, Presiding.

[Title of Cause.]

This case comes on regularly for judgment and sentence this date. E. R. Thurman, Esquire, Assistant United States Attorney, appears for the Government. The defendant, Arnold Enriquez, is present in person with his counsel, Paul Primock, Esquire.

It Is Ordered that the defendant's Motion for New Trial and Motion for Judgment of Acquittal be and they are denied. The defendant is now asked by the Court whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court, the Court finds that no legal cause appears why judgment should not now be imposed and renders judgment as follows:

(Clerk's Note: To avoid duplication, copies of the Judgment and Commitment and Judgment of Acquittal which appear here on the minutes, are not included in this record, the same being exact copies of the signed originals thereof which follow.)

In the District Court of the United States  
for the District of Arizona

No. C-8658 Phoenix

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARNOLD ENRIQUEZ,

Defendant.

### JUDGMENT AND COMMITMENT

On this 15th day of May, 1950, came the attorney for the Government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violating Title 18, United States Code, Section 88 (1946 Ed.) and Title 18, United States Code, Section 371 (Conspiracy to violate 21 United States Code, Section 174 and Title 26 United States Code, Section 2554 (a)), as charged in count 78 in the Indictment.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his



authorized representative for imprisonment for a period of two (2) years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Dated at Phoenix, Arizona, this 15th day of May, 1950.

/s/ DAVE W. LING,

United States District Judge.

[Endorsed]: Filed and docketed May 15, 1950.

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In the District Court of the United States  
for the District of Arizona

No. C-8658 Phoenix

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARNOLD ENRIQUEZ,

Defendant.

JUDGMENT OF ACQUITTAL ON COUNTS 52,  
53, 54, 64, 65, 66, 67, 68 and 69.

Due proceedings having been had on the Indictment filed herein presented against the defendant above named charging a violation of Title 21, United States Code, Section 174, and Title 26,

United States Code, Section 2554(a), as charged in counts 52, 53, 54, 64, 65, 66, 67, 68 and 69, and said defendant's motion for judgment of acquittal having been granted as to said counts 52, 53, 54, 64, 65, 66, 67, 68 and 69,

It Is Adjudged that the defendant is acquitted of the charge aforesaid on said counts 52, 53, 54, 64, 65, 66, 67, 68 and 69 of the Indictment.

Dated at Phoenix, Arizona, this 15th day of May, 1950.

/s/ DAVE W. LING,  
Judge.

[Endorsed]: Filed and docketed May 15, 1950.

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In the United States District Court  
for the District of Arizona

Minute Entry of Monday, May 15, 1950

Honorable Dave W. Ling, United States District  
Judge, Presiding.

[Title of Cause.]

Paul Primock, Esquire, counsel for the defendant now moves for an order fixing bail pending an appeal and files Motion for Order Fixing Bail Pending Appeal, and Notice of Appeal, and

It Is Ordered that said Motion for Order Fixing Bail Pending Appeal be and it is denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Arnold Enriquez, 2022 East Moreland Street, Phoenix, Arizona.

Name and Address of Appellant's Attorney: Paul H. Primock, 507 Title and Trust Building, Phoenix, Arizona.

Offense: Violation 18 U.S.C.A. 88 (1946 Ed.) and 18 U.S.C.A. 371.

Date of Judgment and Sentence: May 15, 1950.

Brief Description of Judgment and Sentence: Found guilty as charged in Count 78 of the indictment and sentenced to Two (2) years imprisonment in a Penitentiary to be designated by the Attorney General.

Defendant now in the custody of the United States Marshal, confined in the Maricopa County jail, Phoenix, Arizona.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated this 15th day of May, 1950.

/s/ ARNOLD ENRIQUEZ,  
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 15, 1950.

[Title of District Court and Cause.]

ELECTION NOT TO COMMENCE  
SERVING SENTENCE

Pursuant to Rule 38 (a) 2, Federal Rules of Criminal Procedure, notice is hereby given by the defendant, Arnold Enriquez, that he elects not to commence serving his sentence imposed by the Court in the above-entitled and numbered action pending his appeal to the United States Court of Appeals for the Ninth Circuit.

Dated at Phoenix, Arizona, this 15th day of May, 1950.

/s/ ARNOLD ENRIQUEZ,  
Defendant.

/s/ PAUL H. PRIMOCK,  
Atty. for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 15, 1950.

At a Stated Term, to wit: The October Term 1949, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-second day of May, in the year of our Lord one thousand nine hundred and fifty.

Present: Honorable John Biggs, Jr., Chief Judge  
(Third Circuit) Presiding.\*

Honorable Albert Lee Stephens, Circuit  
Judge.

[Title of Cause.]

ORDER GRANTING MOTION FOR ADMIS-  
SION TO BAIL PENDING APPEAL

Ordered motion of appellant for admission to bail pending appeal presented by Mr. Paul H. Primock, counsel for appellant and—there being no personal appearance in open court on behalf of appellee—submitted on behalf of appellee on typewritten response heretofore filed, and submitted to the Court for consideration and decision.

Upon consideration thereof, It Is Ordered that said motion be, and hereby is granted, and that appellant be admitted to bail pending disposition of the appeal herein in the amount of \$10,000.00, upon the posting of a good and sufficient surety bond, conditioned as required by law, to be approved by the United States Attorney and District Judge and to be filed with the Clerk of the District Court.

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\*Sitting by special designation.

I Hereby Certify that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled cause.

Attest my hand and the seal of the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 22nd day of May, 1950.

PAUL P. O'BRIEN,  
Clerk.

[Seal] By /s/ FRANK H. SCHMID,  
Deputy Clerk, U. S. Court of Appeals for the Ninth  
Circuit.

[Endorsed]: Filed May 24, 1950.

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In the United States District Court  
for the District of Arizona

Minute Entry of Wednesday, May 24, 1950

Honorable Dave W. Ling, United States District  
Judge, Presiding.

[Title of Cause.]

It Is Ordered that the Bail Bond Pending Appeal, of defendant Arnold Enriquez, in the sum of \$10,000, with the United States Fidelity and Guaranty Company as surety thereon, be and it is approved and that said bond be filed herein.

In the United States District Court  
for the District of Arizona

Minute Entry of Monday, May 29, 1950

Honorable Dave W. Ling, United States District  
Judge, Presiding.

[Title of Cause.]

On motion of Paul Primock, Esquire, counsel for  
the defendant,

It Is Ordered that the time of the defendant,  
Arnold Enriquez, within which to file the record on  
appeal herein and docket the proceeding in the  
United States Court of Appeals for the Ninth Cir-  
cuit, be and it is extended for a period of 60 days.



In the District Court of the United States  
for the District of Arizona

C-8658 Phoenix

REPORTER'S TRANSCRIPT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAY C. LEYVAS, ARNOLD ENRIQUEZ, et al.,  
Defendants.

Appearances:

For the Government:

MR. FRANK E. FLYNN,  
United States Attorney.

MR. E. R. THURMAN,  
Assistant United States Attorney.

For the Defendants:

MR. GEORGE WILSON,  
For the defendant Leyvas.

MR. PAUL PRIMOCK,  
For the defendant Enriquez.

April 26, 1950.

The above-entitled and numbered cause came on duly and regularly to be heard before the Honorable Dave W. Ling, Judge of the above-entitled court, presiding with a jury, commencing at the hour of 10 o'clock a.m. on the 26th day of April, 1950.

The plaintiff was represented by Messrs. Frank E. Flynn, United States Attorney, and E. R. Thurman, Assistant.

The defendant, Ray C. Leyvas, was represented by George Wilson, Esq.; the defendant, Arnold Enriquez was present and represented by Paul Primock, Esq.

The following proceedings were had:

The Clerk: C-8658, Phoenix, United States of America, plaintiff, vs. Ray C. Leyvas and Arnold Enriquez, defendants for trial.

Mr. Thurman: The Government is ready.

Mr. Primock: The defendant, Enriquez, is ready, your Honor.

Mr. Wilson: If the court please, at this time the defendant, Ray C. Leyvas, asks permission of the court for the privilege of withdrawing his plea of not guilty heretofore entered as to count 77 in the indictment.

Mr. Thurman: Page 15 of the indictment, your Honor.

The Court: He wants to plead guilty to count 77?

Mr. Wilson: And to enter a plea of guilty, is that your wish?

Mr. Leyvas: Yes.

The Court: All right.

Mr. Wilson: Now, if it please the court in connection with this plea, Mr. Leyvas is the father of a little girl who is afflicted with Infantile Paralysis. Today was fixed by the Children's Home to operate on the little girl. We had it postponed and they are going to notify us when the operating room will be available. It may be later in the week or it may be next week, but we would like to, with the permission of the court, remain on our bond until such time [2\*] as the court fixes for the imposition of sentence, if that is consistent with the court's idea.

The Court: Well, the court will impose sentence in this case on May 15, at 10 o'clock. That should give you plenty of time.

Mr. Wilson: Yes, thank you, your Honor.

The Court: All right, call the names of 28 jurors.

(Whereupon 28 prospective jurors were called, examined on their voir dire, after which 12 jurors were selected and duly sworn to preside during the trial of this cause.)

The Court: Do you want to make an opening statement?

Mr. Thurman: I believe not, your Honor, I believe the case will be developed sufficiently.

The Court: All right, call your first witness.

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\* Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Thurman: Mr. Nicholson.

REDVERS G. NICHOLSON

was called as a witness on behalf of the Government, and being first duly sworn testified as follows:

Direct Examination

By Mr. Thurman: [3]

Q. Please state your name?

A. Redvers G. Nicholson.

Q. Mr. Nicholson, where do you live?

A. Glendale, California.

Q. Do you hold a position with the Federal Government of the United States?

A. Yes, I do. Chemist at the United States Customs Laboratory.

Q. And where is that laboratory situated?

A. In Los Angeles, California.

Q. How long have you been such chemist?

A. 12 years.

Q. And where have you spent most of that 12 years in your activities?

A. I beg your pardon, I must have misunderstood your question. 12 years at the Customs Laboratory.

Q. In Los Angeles? A. Yes, sir.

Q. Just what are your duties there?

A. My duties are to analyze the materials sent in by the Customs and by the Bureau of Narcotics.

Q. And just how is that handled by the laboratory?

A. Well, in regard to narcotics samples, [4] samples are sent in to us by registered mail; the samples are received; the outer envelope opened up, contents noted from the interior sealed envelope; the interior sealed envelope is placed in the vault with the seals intact until such time as it is analyzed, then analyzed, re-sealed and placed back in the vault until such time as we are requested to bring it into court as evidence.

Q. Under whose care and custody are the samples—are they under while they are in the vault there at the laboratory in Los Angeles, California?

A. They are under the custody of the Chief Chemist.

Q. Now, did you make any analyses of these particular exhibits that are sent to you?

A. Yes, sir.

Q. And have you testified in Federal court many times before today.

A. Yes, sir.

Q. And in this court have you ever qualified and testified?

A. Yes, sir.

Q. Now, you were subpoenaed to bring here today certain exhibits, and have you done that?

A. Yes, sir. [5]

Q. And have you them with you at this time?

A. Yes; I have them here. (Producing package.)

Q. This "United States Customs Laboratory, Los Angeles, California," that is a card on the top. Who put that on there?

A. Yes, sir; I put that on there.

Q. You did?           A. Yes, sir.

Q. Now, who put these seals on here at the top of this box?           A. I did.

Mr. Thurman: I ask that the exhibits here be marked from 1 to 27 for identification.

(Thereupon the articles were received and marked as Government's Exhibits 1 to 27 for identification.)

Mr. Thurman: Are these particular exhibits here marked 1 to 27, Government's, for identification, you are familiar with the exhibits are you, Mr. Nichols?           A. Yes, sir.

Q. And can you tell the court and jury if they were ever received at the laboratory in Los Angeles, California? [6]

A. Yes, sir; they were received——

Mr. Primock: (Interrupting.) Just a moment. I'd like to object to the questions concerning that 22, that is, unless counsel for the government makes an avowal that he is tying Mr. Enriquez up with that. Obviously, there are more Exhibits than there are counts against this defendant and they can't all be brought against him.

Mr. Thurman: There is a conspiracy count here, your Honor, and we expect to tie the defendant into the conspiracy, and as the court knows, all acts of conspirators is an act against each one of them provided it is during the term of the conspiracy and in furtherance thereof, and that is the theory. We have not offered them, of course, but we cer-

tainly have the right to identify them at this time.

The Court: All right.

Mr. Thurman: You say they were received?

A. Yes, sir.

Q. And from whom were they received?

A. From Mr. Earl Smith and Mr. Robert Lorenz of the Bureau of Narcotics, Phoenix, Arizona.

Q. Are you personally acquainted with Mr. Lorenz and Mr. Earl Smith? [7] A. Yes, sir.

Q. Now, have they in the past sent to the laboratory similar exhibits for analysis by you and the other members of the laboratory for analysis?

A. Yes, sir.

Mr. Primock: I object to that, what they have done in the past has no bearing in the case.

Mr. Thurman: Withdraw it.

The Court: All right.

Mr. Thurman: And when these samples were received, how could you tell where they came from?

A. Because it is on the outside of the envelope here, and also there is, in each envelope, an interior envelope which has information written on it.

Mr. Primock: I object to that, your Honor, on the ground that it is hearsay and move that it be stricken.

The Court: The writing still on there?

Mr. Thurman: It is still on there.

The Court: All right, go ahead.

Mr. Thurman: After those exhibits were received, what did you do personally with them?

A. When they were turned over to me by Mr.



(Testimony of Redvers G. Nicholson.)

Custer for analysis, I analyzed them and then after the analysis I placed my seals on them that are on them now and placed them back in the vault.

Q. And you removed them from the vault under the direction of the subpoena issued out of this court?      A. I did.

Q. After you removed them from the vault—that was in Los Angeles?      A. Yes, sir.

Q. What did you do with them then?

A. I placed them in this box that we just opened up, tied them with a string, sealed it and brought them into this court.

Q. Are these particular exhibits practically in the same condition now as they were at the time that you received them by registered mail from Mr. Earl Smith of the Narcotics Bureau here, at Phoenix, Arizona?

A. With two exceptions: One, we have had to take some material out for analysis; two, sitting in the vault over any period of time, it has been our experience that the samples containing moisture will dry out.

Q. Outside of that?

A. Outside of that they are identical as has [9] been received.

Q. Now, referring to Exhibit 1 for identification, I will ask you to examine it and tell us whether or not you made an analysis of that particular exhibit?      A. Yes, sir; I analyzed this.

Q. And what did you find the contents to contain?      A. Prepared smoking opium.

(Testimony of Redvers G. Nicholson.)

Mr. Primock: I object to that, your Honor, the proper foundation has not been laid.

The Court: Go ahead.

The Witness: Prepared smoking opium.

Mr. Thurman: Will you examine Government's Exhibit 2 for identification and tell the court and jury whether or not you made an analysis of the contents of that particular exhibit?

Mr. Primock: May it please the court, for the record I would like to object to this question being asked on each and every exhibit as counsel will do, and to save time, on the ground that no proper foundation has been laid and also there has been no tie-up yet between these exhibits and Mr. Enriquez.

The Court: All right, go ahead.

Mr. Thurman: Answer the question, please. [10]

The Witness: Yes, I analyzed these two jars and they both contained smoking opium.

Q. Examine Government's Exhibit 3 for identification and tell us whether or not you made an analysis of the contents of that envelope, that exhibit?

A. Yes, I examined the contents of this envelope, analyzed it and it contains prepared smoking opium.

Q. With respect to Government's Exhibit 4 for identification, will you examine that and tell us whether or not you made an analysis of the contents of that particular exhibit?

(Testimony of Redvers G. Nicholson.)

A. I analyzed these particular samples and they contained prepared smoking opium.

Q. And with respect to the same question as to Government's Exhibit 5 for identification?

A. I analyzed these and they contained prepared smoking opium.

Q. And with respect to Government's Exhibit 6 and 6-A, will you examine that and tell us whether or not you made an analysis of the contents of that particular exhibit, being Government's Exhibit 6 for identification?

A. Yes, I analyzed these samples and they contained prepared smoking opium. [11]

Q. And what, with respect to Government's Exhibit 7, for identification, did you make an analysis of the contents of that particular exhibit, and did you make a finding?

A. Yes, I analyzed those and it contains prepared smoking opium.

Q. With respect to Government's 8 for identification, will you examine that particular exhibit and tell us whether or not you made an analysis and what your findings were?

A. I analyzed this sample and it contains prepared smoking opium.

Q. Will you examine Government's 9 for identification and tell us whether or not you made an analysis of the contents of that exhibit?

A. Yes, I analyzed this exhibit and it contains impure morphine hydrochloride.

Q. Is that a narcotic drug?

(Testimony of Redvers G. Nicholson.)

A. Yes, a narcotic drug derived from opium.

Q. And is smoking opium a narcotic drug?

A. Definitely.

Q. Government's 10 for identification, will you examine that and tell us whether or not you made an analysis and what the final results of your analysis were?

A. I analyzed this sample and it contains [12] prepared smoking opium.

The Court: We will have our morning recess at this time. During the recess you will not discuss the case among yourselves nor permit anyone to discuss it with you, also avoid forming or expressing any opinion upon any subject connected with it. The court will stand at recess for five minutes.

(Whereupon a short recess was taken.)

After recess, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: You may proceed.

Redvers G. Nicholson resumed the witness stand and testified further as follows:

Direct Examination

(Resumed)

By Mr. Thurman:

Q. Mr. Nichols, I hand you Government's 11 for identification and ask you to make an examination and tell us whether or not you analyzed it and what the findings were in that analyses?

(Testimony of Redvers G. Nicholson.)

A. This sample shows heroin hydrochloride, [13] a narcotic drug derived from opium.

Q. I hand you Government's Exhibit 12 for identification, an envelope which contains two packages. Will you examine the exhibit and tell us whether or not you analyzed the contents of both the small envelopes contained in the large envelopes, and what the findings were, if any?

A. On the one envelope which is marked Exhibit 13 on the original marking that is prepared smoking opium. Now, the same envelope which is marked 13, is heroin hydrochloride, a narcotic drug derived from opium, and in Exhibit 14, the original marking, it contains heroin hydrochloride, a narcotic drug derived from opium.

Q. I hand you Government's Exhibit 13 for identification and I will ask you to examine the exhibit and tell us whether or not you made an analysis of the contents of that exhibit?

A. I examined this exhibit and it contains heroin hydrochloride, a narcotic drug derived from opium.

Q. I hand you Government's Exhibit 14 for identification. I will ask you to examine that and tell us whether or not you made an analysis of the contents of the exhibit and what the findings of the exhibit were? [14]

A. I examined both of these exhibits and they both contained heroin hydrochloride, a narcotic drug.

Q. You say you made——

(Testimony of Redvers G. Nicholson.)

A. There is my original markings, Exhibit 15 and Exhibit 15-A.

Q. And contained a narcotic drug, did it?

A. Yes, contained narcotics.

Q. Handing you Government's Exhibit 15 for identification, I will ask you to examine it and tell us whether or not you made an analysis of the contents of the exhibit and what the findings were?

A. This exhibit contains two exhibits. I analyzed both of them, the original marking, Exhibit 16, contains morphine hydrochloride; the original marking 16-A, shows heroin hydrochloride. Both are narcotic drugs derived from opium.

Q. I will ask you to examine Government's Exhibit 17 for identification and I will ask you if you made an analysis of the contents of the exhibit and what the findings were?

A. I analyzed this sample and it contains two exhibits. One exhibit, 18, the original marking, was morphine hydrochloride, a narcotic drug derived from opium, and Exhibit 18-A, original [15] marking, contains prepared smoking opium.

Q. I hand you Government's Exhibit 18 for identification and I will ask you if you examined it and tell us whether or not you made an analysis of the contents of that exhibit?

A. I analyzed this exhibit and it contains prepared smoking opium.

Q. Handing you Government's 20 for identification, I will ask you to examine the exhibit and tell



(Testimony of Redvers G. Nicholson.)

us whether or not you made an analysis of the contents of that envelope?

A. I analyzed this exhibit and it contains prepared smoking opium.

Q. Handing you Government's Exhibit 21 for identification, I will ask you to examine the exhibit and tell us whether or not you made an analysis of the contents of the exhibit and what the findings of that analysis were?

A. A analyzed this exhibit and it contains prepared smoking opium.

Q. Handing you Government's Exhibit 24 for identification, I will ask you to examine it and tell the court and jury whether or not you analyzed the contents of that exhibit and if you did, what was the result of that analysis?

A. I analyzed this exhibit and it contains [16] prepared smoking opium.

Q. I will ask you to examine Government's Exhibit 25 for identification and tell us whether or not you analyzed the contents of the exhibit, and if so, what the findings of the analysis were?

A. I analyzed this exhibit and it contains heroin hydrochloride, a narcotic drug derived from opium.

Q. Does that have any trade name other than the technical name that you gave it?

A. No, we call it heroin hydrochloride.

Q. And it is a narcotic drug?

A. It is a narcotic drug derived from opium.

Q. Handing you Government's Exhibit 26 for identification, I will ask you to tell us whether or



(Testimony of Redvers G. Nicholson.)

not you made an analysis of the contents of that exhibit?

A. Yes, I put this string around it when I got through analyzing it.

Q. This paper you are tearing off, that is your work?

A. The paper is what it came mailed in and to keep the paper intact——

Q. (Interrupting.) You didn't destroy all of the paper?

A. I analyzed this paper and it contains 71 [17] marijuana cigarettes and approximately 232 grains of marijuana, loose marijuana.

Q. I hand you Government's Exhibit 27 for identification and I will ask you to examine the contents of the exhibit and tell us what your findings were, if any?

A. I analyzed this exhibit and it consists of two samples, one of prepared smoking opium, and the other is yen shee, or a residue from prepared smoking opium.

Q. Now, all of these samples, all of these exhibits that you have mentioned, they were handled in the ordinary and regular course of business in the handling of such matters at the laboratory at Los Angeles?

A. Yes, yes, went through our regular routine, yes.

Mr. Thurman: You may cross-examine.

(Testimony of Redvers G. Nicholson.)

Cross-Examination

By Mr. Primock:

Q. What is your first name, Mr. Nicholson?

A. Redvers.

Q. R-e-d-v-e-r-s?

A. R-e-d-v-e-r-s.

Q. Now, Mr. Nichols, I hand you Exhibit 1. [18]  
Can you tell me how many grains of opium that contains?

A. I shall have to refer to my records here because I could not keep that over a period of years.

Q. You didn't mark it down on each exhibit?

A. No, we don't mark it down on each exhibit. We only hand in a formal report, formally signed report in which it is marked down. We do not mark it down, we do not put any extraneous markings except the Lot number.

Q. All that those exhibits would show, then, is that it is smoking opium, without how many grains or ounces, is that correct?

A. On the package, as well as write down how many grains when they weighed it.

Q. Do you weigh them when you examine them? Do you weigh each exhibit when you examine them?

A. Yes, sir.

Q. And then you can tell exactly the weight of each exhibit?

A. I can give you the exact weight of each exhibit, yes, sir.

(Testimony of Redvers G. Nicholson.)

Q. But not checking with the exhibit, is that correct?

A. Yes, sir. In other words, we have our [19] records that we make, our report, a written report, a signed written report that is sent to the Bureau of Narcotics covering each and every exhibit when we get through analyzing, and the weight that we find is marked on that report. I have it here, if necessary, on my report cards.

Q. And who prepared that report?

A. It is prepared by Mr. Custer, Chief Chemist.

Q. You didn't prepare it at all?

A. I write on the cards and say what I find and he works along with me. Sometimes we both write on what we find and that goes into the report. This is done at the laboratory, and he directs the stenographer to write it up, not me.

Q. But the report you have in your hand was prepared by Mr. Custer and not by yourself?

A. Not prepared by me, but these are my cards, my work cards.

Q. Your work cards?

A. Yes, sir, these are the work cards.

Q. How many grains of morphine are there to an ounce?

A. How many grains of morphine to an ounce?

Q. Yes.

A. 437½. [20]

Q. 437½ grains for each ounce?

A. Yes, sir.

Q. Now, from your report can you tell me—the

(Testimony of Redvers G. Nicholson.)

report that you made out yourself, can you tell me how many grains of opium there was in Exhibit 1 that you just identified?

A. Well, if you will give me the exhibit so I can check the lot number and cross-checking—you see they are different numbers now than what was originally on the exhibit, that is why I mention that. On this exhibit that I have in my hands right now we received 160 grains.

Q. And that was weighed by you? A. Yes.

Q. You don't know of your own knowledge, do you, Mr. Nichols, where these exhibits came from?

A. Other than they were sent to us by Mr. Smith and Mr. Lorenz.

Q. All you know is they came through the mail with Mr. Smith's and Mr. Lorenz' name written on the package, isn't that correct?

A. With the receipt in duplicate which we have to sign showing we received this particular exhibit from whoever the man was that sent it in that sealed envelope.

Q. You don't know where they came from or how [21] they were picked up?

A. No, sir; that is not our——

Q. (Interrupting.) That is all.

Mr. Thurman: That is all.

(The witness was excused.)

Mr. Thurman: Viron A. Elkins.

## VIRON A. ELKINS

was called as a witness on behalf of the Government, and being first duly sworn testified as follows:

## Direct Examination

By Mr. Thurman:

Q. Please state your name.

A. Viron A. Elkins.

Q. And, Mr. Elkins, where do you live?

A. Tempe.

Q. And, how long have you lived in Tempe, Arizona, Mr. Elkins?      A. Seven years.

Q. Huh?      A. Seven years.

Q. Now, during that period of time did you become acquainted with one, Arturo C. Leyvas?

A. Yes, sir.

Q. Did you know a man by the name of, this defendant here, Arnold Enriquez?      A. No.

Q. Did you ever meet Arnold Enriquez?

A. No.

Q. Never did?      A. No.

Q. Do you know Ray C. Leyvas?      A. Yes.

Q. Do you know a woman by the name of Connie Duarte?      A. Yes, sir.

Q. Do you know a man by the name of Arturo E. Jerez?      A. Jerez?

Q. Yes.      A. Yes, I know him.

Q. Do you know him by any other name other than Jerez?

A. Yes, Colimo, is the name I know him by.

Q. Do you know another man by the name of

(Testimony of Viron A. Elkins.)

Joe Martinez?           A. No, I don't know him.

Q. When did you first meet Arturo C. Leyvas, Mr. Elkins?

A. I believe it was in November, '48, I believe.

Q. Is that the first time you met Arturo C. Leyvas, was in November, 1948?

A. Yes, sir; I believe that is right.

Q. With respect to Arturo E. Jerez, or Colimo, as you know him, when did you first meet that gentleman?           A. Colimo?

Q. Jerez—yes, Colimo?

A. Oh, I knew him for several years.

Q. Well, we will lay the premise with the year '48?

A. The latter part of January, I knew him, I had seen him.

Q. You saw him, and where did you see him?

A. He came to the office of the place where I worked in Tempe.

Q. Just where is that office in Tempe?

A. 611 Mill Avenue, real estate office.

Q. And what time of day was it that he came there?

A. Oh, in the morning, along—the best I can remember, along about ten or eleven o'clock.

Q. Was anyone with Jerez at that time?

A. I didn't see anyone. He was in a car and apparently alone, but I didn't go up to the car. [24]

Q. Did you see this car?           A. Yes, sir.

Q. Can you tell the court and jury what kind of car it was?

(Testimony of Viron A. Elkins.)

A. Well, it was a Cadillac sedan, green Cadillac sedan. I don't know the make or what year it was, it was one of these later models. I judge a '46.

Q. And what took place between you and Jerez there with respect to this case?

Mr. Primock: If the court please, I am going to object to that, first on the ground that is going to call for a hearsay answer: secondly, they are attempting to show an overt act and they have not proved a conspiracy as yet, and anything that this man can say was outside of the presence of the defendant, Enriquez, and they have not proved any conspiracy, so, therefore, it is inadmissible.

The Court: Go ahead.

The Witness: Will you read the question?

(The question was read by the reporter.)

The Witness: Why, he told me that he had some smoking opium for sale and wanted to know if I wanted to buy some, and I believe he quoted me a price, said it was \$300 a can, I could get it [25] for \$300 a can, and we talked there a little while and he said that there was—it might—I don't know whether——

Mr. Thurman (Interrupting): You go ahead and let the court decide whether it is admissible or not.

A. He said there is two other parties in with him on the stuff, Art Leyvas and Enriquez, or "Pirata," "Pirata," he told me, I guess that gentleman there (indicating the defendant), I don't know him. There is two fellas that were in with him on this stuff.



(Testimony of Viron A. Elkins.)

Q. Then what happened?

A. Well, I—we talked a little bit, and I told him, “Okay, I’d get in touch with him.” He told me I could find him at the Phoenix Mattress Factory, at 1501 East Adams any time I wanted any, or anybody else that wanted any of it, so he left then and came back to Phoenix, I presume, he left there anyway. I got in touch with Mr. Smith and told him what happened and he told me to try and buy off of him, so I did. I came over to the mattress factory the next day and “Pirata”—or, Colimo was there, working there apparently, anyhow, I honked my horn. He came out and I told him I wanted \$50.00 worth of smoking opium, so he [26] told me to go down by the street by East Adams school and wait for him, he would be down there in a few minutes. I did. He came down there, I’d say, in not over ten minutes and got in the car by the side of me and took out of his pocket a jar of opium and I gave him the \$50.

Q. Now, were you in your car or was Jerez in another car?

A. He came there in the mattress factory’s truck. I had been in my car. He got out of his car and got in my car. He was sitting there for just a second while he delivered this stuff.

Q. He was not in the Cadillac sedan where he delivered it?      A. Not that day, no, sir.

Q. Handing you Government’s Exhibit 1 for identification, I will ask you to examine it, Mr.

(Testimony of Viron A. Elkins.)

Elkins, and see if you can identify it; I will break these seals on here.

A. Yes, that is the jar of—initialed—I initialed the day, the next day after it was bought. It was bought, I guess it was the 16th. It was bought, initialed it the day it was bought and I turned it over to Mr. Lorenz.

Q. You gave it to Mr. Lorenz?

A. Yes, sir. [27]

Q. You identify this by that marking?

A. I do, yes, sir, this jar.

Mr. Primock: Do you offer that?

Mr. Thurman: No, not yet. Now, after this particular transaction that you mentioned, did you see Jerez again, or Colimo?

A. Yes, along the first part of July—well, I seen him along different times. He was over there on May 1st. I made a purchase in May, sometime, I am not sure of the date.

Mr. Primock: If the court please, I am still going to object to this line of examination, on the ground that they have not shown any conspiracy.

The Court: Well, they have to have an opportunity to do that. It cannot be proved by one witness, of course, that is obvious.

Mr. Thurman: Referring to the 27th day of February, 1948, did anything take place at that time with respect to this case?

A. Yes, yes. I recall a \$125.00 buy at that time. "Buy," I mean that much stuff.

(Testimony of Viron A. Elkins.)

Q. Tell us about that, or the facts leading up to it as near as you can at this time, Mr. Elkins.

A. Well, I came over and contacted Colimo at the mattress factory on East Adams, told him that I had a Druggist friend of mine that was visiting me there and he wanted to buy some stuff, \$100.00 worth, and he was supposed to come over the next day and deliver it. He never showed up, so then——

Q. (Interrupting): He was supposed to go where, and deliver it?

A. To my house, he was to deliver it to my house.

Q. And that is where?

A. About a mile and a half east of Tempe.

Q. I see. Proceed.

A. So he didn't show up that day, but he came the next day about, I think it was 11:30, anyhow it was during the day of the 28th, I believe, about that time, and he stopped the car and he said he didn't want to meet this druggist friend of mine, he wanted me to get in the car with him and go up the road and we went up there and he had this stuff under a tree. He turned around, got out, and got it and turned around and come back to the house, stopped in front there and I gave him the money and he gave me the opium.

Q. How much money did you give him?

A. \$125.00.

Q. And what did you get for the \$125.00?

A. Opium, smoking opium. [29]

(Testimony of Viron A. Elkins.)

Q. In what kind of a container was it at that time, if you remember?

A. It was in jars.

Q. How many jars?

A. Two jars, as I recollect, yes, sir.

Q. I hand you Government's Exhibit 2 for identification, and I will ask you to examine it, breaking the seals on it, on the package. Will you examine the contents of the exhibit and tell us whether or not you can identify it.

A. Yes, that is one of them.

Q. How can you tell?

A. Well, I initialed it, put the date on it, the date that the purchase was made.

Q. And what initials did you use?

A. VAE, and this is the same; this is the other one.

Q. You recognize that or identify it in the same manner?      A. Yes, sir.

Q. What about this green package that they were in?

A. Well, they was like that when he gave it to me and he picked it up out of some leaves, might have been a little dirt and some leaves on it. That is the way it was. [30]

Q. It was like this?

A. Yes, sir; that is as I remember it. It has been quite a while ago, but I am sure that is the way it was.

Q. Well, subsequent to this purchase you have

(Testimony of Viron A. Elkins.)

just told us about, this \$125.00 deal, what took place after that as far as you know from your own personal knowledge?

A. Well, as I said a while ago, I talked to Colimo off and on and I don't believe there was any purchase made, there could have been another one in May, I believe there was, I am not sure about that, but I do know in July that I went over—I came to Phoenix. In the meantime, Colimo had been over there again several times to see me, to tell me he had this or could get this or that, narcotics, I mean, here in Phoenix, but I never bought any more of that until first, along the first part of July or the middle of July, he came over there and told me he had some smoking opium, any amount that I wanted, and so I got in touch with Mr. Smith, and on July 22nd, I believe, I know that is the day that the purchase was made, and I think the days leading up to that was the 20th or the 21st, but anyway, that is the date the exchange was made and it was five cans of opium. [31] I came over to Phoenix here and Colimo was in a little restaurant on East Washington right next to Pirata's Inn, a little Spanish restaurant there, and I came up and blew my horn and he come out and he got in the car with me and we drove up the street and turned around. I told him what I wanted, I wanted five cans of opium, and he told me he would deliver it over to my house, so I went back to Tovrea's where I think Mr. Smith was, or some of them was waiting there. Anyway, I went back there and I told them

(Testimony of Viron A. Elkins.)

that the arrangements was made and the time he was to come over there, so it was in the afternoon, I believe it was in the afternoon of the 22d, anyway, he come over there and drove into my yard in this same green Cadillac that he had contacted me before at the office, and he had five cans of smoking opium and we had agreed on the price, came to \$1,375.00, so I counted him out his money. I first told him I wanted to look at the stuff to see if it really was opium and I was not getting gypped.

Q. You knew opium, did you?

A. I smelled of it, yes, sir; so I looked at it and to the best of my knowledge I thought it was opium, so I paid him the money and took it [32] and turned it over to Mr. Lorenz and Smith.

Q. Now, you mention the cafe. Did you go into this cafe on the 22d day of July?

A. I will tell you, sir, it has been—I believe I did, I did; I believe I did go in there.

Q. What is the name of that inn or cafe?

A. I don't know, it is a Spanish restaurant. It is the only one there, a lady there I know. It may be the day, this day that I—he told me that any time that he wasn't there to tell one of those girls and they would get in touch with him.

Q. Just where was this cafe located, Mr. Elkins?

A. East, right next door to Pirata's Inn, the second door from 16th Street.

Q. You mean Pirata's Inn?

A. Yes, yes, that is it.



(Testimony of Viron A. Elkins.)

Q. What kind of a car, if any, was Arturo Jerez in on that day?

A. You mean, what car did he bring the stuff over in?

Q. Yes. A. A Cadillac.

Q. What color was it? A. Green. [33]

Q. Did you get the license number of that car?

A. No, sir; I didn't, the same car that he was in the first of the year when he came over there, first contacted me about this.

Q. Now, Mr. Elkins, when you got these five unlabeled cans of smoking opium from Jerez, after you paid him the money for it what did you do with it?

A. I turned it over to Lorenz, I think, or Earl—I don't know whether Mr. Smith was there or not, but Mr. Lorenz was, I know.

Mr. Thurman: Is Mr. Lorenz in the courtroom now?

(Thereupon Mr. Lorenz arose in the courtroom.)

Mr. Thurman: Is this the gentleman you mean when you say "Mr. Lorenz"?

A. That is right, yes, sir.

Q. Will you please examine this exhibit here and tell us whether or not those are the four cans of smoking opium that you purchased from Colimo, otherwise known as Jerez, on the 22d day of July, 1948, near Pirata's cafe in Phoenix, Arizona?



(Testimony of Viron A. Elkins.)

A. This stuff has run all over here so bad, I don't know, I can't even——

Q. (Interrupting): Where was that delivered, did you say?

A. In the yard at my house. This was supposed to be opium?

Q. I don't know, I don't know opium. I am not an expert. I just want to know if you can identify those cans.

A. I am going to tear something off here. (The witness has difficulty identifying the exhibit due to contents of can seeping through top.)

Q. (By Mr. Thurman): Go ahead, tear it off, that is what we have it here for the purpose of you making an examination. Prior to the time or at the time you gave this exhibit, the four cans, to Mr. Smith, did you put any markings on them?

A. Oh, yes, yes, every time.

Q. What did you mark, the end or the top?

A. Well, we marked the top of them, I think, I wouldn't say for sure, but I believe it was marked on the lid.

Q. Well, can you identify any one of them?

A. Should be all of them is the same, but this thing is messed up here to where you can't—this here, signed it, our initial on it.

Mr. Primock: I am going to object to the extemporaneous remarks by the witness. [35]

The Court: You talk too much.

The Witness: I never seen no such mess as that.

Mr. Thurman: Never mind.

(Testimony of Viron A. Elkins.)

A. This looks like the cans I had, but I can't see no marks, I can't identify nothing like that unless we could see the marks on them. From all indications, they are the ones, the cans and everything looks the same, unless it could be—we could strip them off, heat them or something, melt it off of them, why there is no way I or anybody else that could say that——

Q. (Interrupting): Never mind. Do you see these markings here? Are those scratchings, or what are they?

A. Well, that is just scratches there.

Mr. Primock: I can't hear your answer.

A. Just scratches, I said.

Mr. Thurman: What is this paper here? Anything on that that you can see?

Mr. Primock: I am going to object to the leading form of the question of counsel and I will also object to any other questions concerning these particular cans that the witness has already testified he can't identify.

The Court: Yes, I think it is just a waste [36] of time.

The Witness: Here is the paper back——

Mr. Primock (Interrupting): Just a moment.

The Court: Well, as far as the cans are concerned he can't find anything on those. See what you can find on the paper.

A. Here is a part of it. From all indications, this is my initials here, VAE. The E is not plain on there, but I believe that is my initials.

(Testimony of Viron A. Elkins.)

Mr. Primock: If the court please, I am going to object to this witness continuously mumbling something I can't hear. Ask him to only answer questions that are asked him by counsel.

The Court: He was asked one question.

A. I was just trying to find the initials on here.

Mr. Thurman: Do you find any place on this paper sack that was around those four tins where you wrote your initials on this sack?

A. I am trying to find it. There is a piece of paper which has got VA on it, I am pretty sure that is my initials.

Q. That was done where?

A. At my house before Mr. Lorenz left there, and Smith, whoever it was with him there that day. The lids, I am sure, were initialed. I can't find any markings on them. They are on there. It looks like the stuff. At the top is the——

Mr. Thurman: Never mind, that is all right. Now, in your direct examination I believe I interrupted you, I think you said something about May 1st, 1948.

A. Yes, sir; I did.

Q. What did you have reference to on that date, Mr. Elkins?

A. I don't remember that date.

Q. Mr. Elkins, I'd like to, for the purpose of refreshing your memory, show you Government's Exhibit 3 for identification and ask you if that does in any way refresh your memory?

Mr. Primock: I object to that, your Honor, trying to impeach his own witness.

(Testimony of Viron A. Elkins.)

The Court: Oh, I think he is trying to lead him, I don't think he is trying to impeach him.

Mr. Primock: I object on the ground it is leading.

The Court: Oh, go ahead, he has probably forgotten about that.

Mr. Thurman: In the examination of those [38] particular exhibits, do they in any way refresh your memory?

A. Well, that is my initials on them.

Q. I understand that, but I mean does that refresh your memory as to any transaction concerning them? A. No.

Mr. Thurman: You may cross-examine.

### Cross-Examination

By Mr. Primock:

Q. Mr. Elkins, how long have you known Earl Smith? A. Oh, about two years.

Q. How long have you known Lorenz?

A. About the same time.

Q. And are you employed by the United States Government? A. No, sir.

Q. Are you employed by Earl Smith or Bob Lorenz?

A. No—well, I don't know, just that I am not working on any salary, no.

Q. What are you working on, get paid so much per case? A. I was paid, yes. [39]

Q. How much did you get paid for each indi-

(Testimony of Viron A. Elkins.)

vidual case?           A. I don't know.

Mr. Thurman: I think that is immaterial how much. He can say he got paid.

The Court: He may answer.

Mr. Primock: What was your answer?

A. I say it depends I guess on the case. This is the only one I ever worked on.

Q. On this particular case here, how much did you get paid?

A. \$1,000.00, paid through the Border Patrol, I think.

Q. Now, Mr. Elkins, how do you happen to know the smell of opium?

A. How do I know the smell of it?

Q. Yes.           A. I just smelled it at times.

Q. Have you ever used opium?

A. Not in that form, no.

Q. Have you ever used opium in any form?

A. Well, under the care of a doctor is all.

Q. You are under the care of a doctor right now?

A. Yes.

Q. He prescribes opium for you? [40]

A. No.

Q. Does he prescribe narcotics in any form?

A. He does when I need it, I guess.

Q. Have you ever used narcotics prior to this time?

Mr. Thurman: I don't think that is material.

Mr. Primock: I think it is, your Honor. He says he knows opium by the smell of it.

The Court: Well, confine it to opium, then.

(Testimony of Viron A. Elkins.)

Mr. Primock: How many times have you handled opium? A. Never handled it at all.

Q. Never handled it at all?

A. I smelled it.

Q. How many times have you smelled opium?

A. Oh, once or twice, I am not an expert at it.

Q. I believe you stated that all of your transactions were held with Arturo Jerez, or Colimo, as he is called, is that correct?

A. All the transactions I had?

Q. On the purchase of all this opium that you smelled and identified here, that was all done with Colimo, was it not? A. That is right.

Q. And how long have you known Colimo before [41] you had the first transaction with him?

A. I don't know. I knew—just knew him when I seen him for several years.

Q. And this morning of January, 1948, when he came to your office in Tempe, was that the first transaction you ever had with him?

A. It was, yes, sir.

Q. That was the first time you ever discussed opium or narcotics with him?

A. I talked to him once or twice about it.

Q. Had you ever asked him to purchase opium before January, 1948?

A. Did I ever ask him?

Q. Did you ever ask him if you could purchase opium or narcotics prior to January, 1948, when he came to your office in Tempe?

A. I don't remember if I did.

(Testimony of Viron A. Elkins.)

Q. But you did ask him on this particular day in January?

A. No, I didn't ask him. He came and asked me.

Q. Oh, he came and asked you if you wanted to buy some opium? A. Yes.

Q. Did he give you any reason why he was asking you to buy? [42]

A. He was trying to peddle it, I guess, that is all I know.

Q. Didn't he give you any reason why; didn't he tell you any reason?

A. No, not that I remember.

Q. Just out of the clear sky, he walked into your office and said, "I want to sell you some opium"?

A. I guess you might call it that, yes. I knew Colimo before that—

Q. (Interrupting): Just a moment. Just answer my question. Then you saw him again on the 27th day of February, 1948, is that correct?

A. No, I seen him on the 15th of February.

Q. Well, you had another transaction with him on the 27th day of February, 1948?

A. I don't know what you mean.

Q. Well, you purchased some more opium or narcotics from him on the 27th of February, 1948, didn't you?

A. On the 16th I made a purchase.

Q. On the 16th of February? A. Yes.

Q. You didn't make one on the 27th?

A. Yes, I did, I identified one of these.



(Testimony of Viron A. Elkins.)

Q. Well, I am talking about the 27th day of [43] February. A. Well, I made a purchase.

Q. You are sure it was the 27th day of February?

A. Well, I am not sure—well, I believe it was, yes, sir.

Q. Is there anything that recalls to your mind, any particular thing which would place—would make you place it on the 27th day of February, 1948?

A. Well, he was over there along the latter part of February and I know the next transaction taken place with him was, well, yes, that was bought on the 27th or 28th of February.

Q. What is there around the circumstances that makes you place it on the 27th day of February?

A. The reason I remember it, I—this man—this transaction, I remember, I can't say for sure on that, I might be wrong, but——

Q. On July 22d, 1948, you are sure of that date?

A. Yes, sir.

Q. What makes you so sure that it happened on the 22d of July, 1948?

A. Well, because it built up to it and that [44] date was in our mind.

Q. Do you remember what day of the week July 22d was? A. A large purchase.

Q. Do you remember what day of the week July 22d was?

A. No, I don't remember what day of the week it was.

(Testimony of Viron A. Elkins.)

Q. Where did you get this money that you gave to Colimo for the purchase of those narcotics?

A. From the narcotic officers.

Q. Mr. Smith? A. Yes, sir.

Q. Now, when is the last time you discussed this case with Mr. Smith?

A. For this trial, you mean?

Q. Yes. A. Oh, a week or so ago.

Q. And who else was present at that time?

A. Just he and I.

Mr. Thurman: I don't think that is material, two days before the trial.

The Court: Well, there wasn't anybody else there.

Mr. Primock: I believe that is all.

Mr. Thurman: Your Honor, on account of the method of trial, I may have to recall this witness, your Honor, but he is excused for the present.

The Court: All right.

(The witness was excused.)

The Court: All right, we will suspend now until 1:30. Keep in mind the court's admonition and be in your places at 1:30.

(Thereupon a recess was taken at 12 o'clock noon.)

1:30 o'clock p.m. of the same day, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: You may call your next witness.

Mr. Thurman: Mr. Lorenz.

ROBERT W. LORENZ

was called as a witness on behalf of the Government,  
and being first duly sworn, testified as follows:

Direct Examination

By Mr. Thurman:

Q. Please state your name.

A. Robert W. Lorenz.

Q. Mr. Lorenz, where do you live? [46]

A. Phoenix, Arizona.

Q. How long have you lived here?

A. Approximately three years.

Q. During the particular three years that you  
lived here in Phoenix, Arizona, have you held an  
official position with the Federal Government?

A. I have.

Q. In what capacity?

A. Federal Narcotic Agent.

Q. Now, just what are your duties and responsi-  
bilities as such officer, Mr. Lorenz?

A. To investigate, prevent narcotics from being  
sold in the United States.

Q. By "narcotics," what do you mean generally  
by that term, "narcotics"?

A. Opium or any of its derivatives.

Q. Now, under whose immediate supervision, if  
any, do you work? A. Earl A. Smith.

Q. That is the gentleman who sits here to my  
right? A. Yes, sir.

(Testimony of Robert W. Lorenz.)

Q. Now, during the period here in Phoenix, Arizona, have you had occasion to make an investigation in the case of the United States of America vs. Arturo C. Leyvas, Arnold Enriquez, [47] Ray C. Leyvas, Connie Duarte, Arturo E. Jerez and Joe Martinez?      A. Yes, sir.

Q. And did you become acquainted with each one of those persons whose names I have just read off to you?      A. Yes, sir.

Q. And when did you first start your investigation in this case, if you remember?

A. In the early part of '48.

Q. In the early part of '48?      A. Yes, sir.

Q. Did you become acquainted with a gentleman by the name of Viron A. Elkins, who testified here this morning?      A. Yes, sir.

Q. And when did you first meet up with Mr. Elkins?      A. At about the same day.

Q. And did you ever discuss with this man Elkins any of the facts in this case?

Mr. Primock: I object to that as no proper foundation having been laid.

Mr. Thurman: I withdraw the question. When did you first meet Arturo E. Jerez?

A. It was approximately the same time. [48]

Q. What time was that?

A. Beginning of 1948, in January, sometime.

Q. In January, 1948, and where was that meeting?

A. I had seen him on many occasions about town, here in Phoenix.

(Testimony of Robert W. Lorenz.)

Q. Did you ever see him in the vicinity of Tempe, Arizona?      A. Yes, sir.

Q. And about when?

A. About February 16th.

Q. About February 16th of what year?

A. '48.

Q. I see, and about what time of day was it?

A. Let's see, that day was not correct.

Q. Huh?

A. That day was not correct, but the first time I had seen him in the vicinity was July 22d.

Q. July 22d, '48?      A. Yes.

Q. Where did you see him?

A. I saw him at the residence of Mr. Elkins.

Q. And where is that residence?

A. It is east of Tempe, Arizona, about one and a half miles.

Q. When you speak of this man Elkins, you mean [49] this man that just preceded you on the witness stand?      A. Yes, sir.

Q. And who was there at the Elkins' place on the 22d of July, 1948, besides yourself and Elkins and Jerez?

A. Those were the only three persons.

Q. And where were you?

A. I was concealed in the barn of Mr. Elkins, approximately 30 feet from the defendant.

Q. And where was the defendant?

A. Parked in the Cadillac right in front of me.

Mr. Primock: Just a moment, may I ask a question on voir dire?

(Testimony of Robert W. Lorenz.)

The Court: Yes.

Mr. Primock: When you say the defendant, you mean Enriquez?

A. No, I meant Arturo Jerez, called Colimo.

Mr. Thurman: Where was Elkins at this time that you were parked in Elkins' barn about 30 feet from the defendant, Jerez, where was Elkins?

A. He was at the side of the car with Jerez.

Q. I see, and what sort of car was this?

A. It was a green Cadillac, '41, I believe, had Arizona license, 1948 Arizona license AN-2236. [50]

Q. Did you later find out who that car belonged to? A. Yes, sir.

Q. To whom? A. It was registered to——

Mr. Primock: I am going to object to that as not the best evidence.

Mr. Thurman: The best evidence is right here. Please mark this for identification.

The Court: To save time, show it to counsel.

Mr. Thurman: I want to mark it first.

The Court: All right.

(Thereupon the document was marked as Government's Exhibit 28 for identification.)

Mr. Thurman: I hand you a purported certificate of title (showing document to Mr. Primock). The Government now offers in evidence Government's Exhibit 28 for identification.

Mr. Primock: May I ask a few questions on voir dire, your Honor?

The Court: All right. I don't know what this witness would know about the certificate from the

(Testimony of Robert W. Lorenz.)

Highway Department. He wants to ask a few questions on voir dire.

Mr. Thurman: I object. I don't see the purpose of it, I object to it. [51]

The Court: I don't either. The objection is sustained.

Mr. Thurman: Any objection to the admissibility of the document? Your Honor, this is a certified copy of the Highway, Arizona State Highway Department, with respect to a motor vehicle.

Mr. Primock: I want to object to the registration as not being a certified copy, your Honor.

The Court: A registration card?

Mr. Primock: Yes, your Honor.

Mr. Thurman: It is a part of the record, I think.

The Court: It is attached to it. All right, it may be received.

(Thereupon, the document was received in evidence as Government's Exhibit 28.)





GOVERNMENT'S EXHIBIT NO. 28

# 1948 ARIZONA REGISTRATION CARD

MOTOR VEHICLE DIVISION - PHOENIX, ARIZONA

DATE ISSUED MAR 11, 1948 PLATE AB 2236  
 NAME OF OWNER ENRIQUEZ, ARNOLD S. TITLE NUMBER 550834

ADDRESS 2022 E. MORELAND, PHX.  
 MAKE CADILLAC TYPE OF VEHICLE SEDAN ENGINE NUMBER 8381284  
 YEAR 1942 MODEL NUMBER 6269 SERIAL NUMBER 3000  
 UNLADEN WEIGHT \_\_\_\_\_ TIRE NUMBER \_\_\_\_\_ EQUIP \_\_\_\_\_

FUEL USED \_\_\_\_\_ COUNTY MARICOPA

THIS CERTIFIES THE PERSON ABOVE NAMED HAS DULY REGISTERED IN THE STATE OF ARIZONA THE VEHICLE DESCRIBED HEREON. THIS CARD MUST BE CARRIED IN THE VEHICLE SUBJECT TO INSPECTION.

THIS COPY FOR MOTOR VEH. DIV.

**W E STANFORD** **TM**  
 COUNTY ASSESSOR

SIGNATURE OF OWNER

FORM 223-4709-90M-7-24-47

REGISTER FEE 7.000X

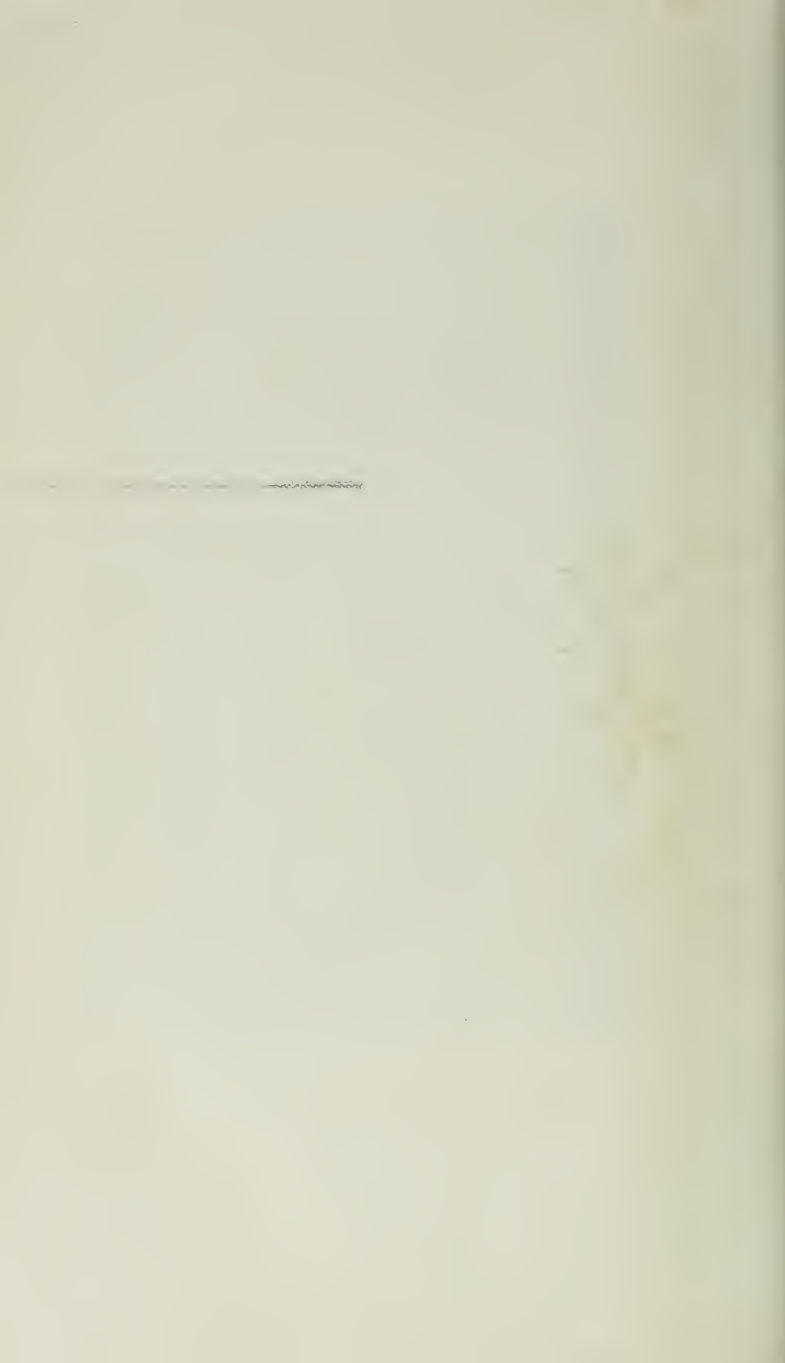
PENALTY \_\_\_\_\_

WEIGHT FEE \_\_\_\_\_

LIEU TAXES 7.00

TOTAL \$ 14.00

LIEU TAX REC. NO. 23534 C



# ASSIGNMENT OF TITLE

To be filled in by seller and delivered with vehicle to the purchaser. Application for new Certificate of Title must be made and immediately forwarded to Division of Motor Vehicles, Phoenix, Arizona, with fee. FOR VALUE RECEIVED I (WE) HEREBY SELL AND ASSIGN TO, (This day of 10

NAME OF PURCHASER Residence Address City State

the vehicle described on the reverse side of this Certificate and I (We) hereby warrant the title of the said vehicle to be free from all liens and encumbrances except as follows:

Amount of Lien, \$ 1138.72 Kind of Lien e Date 2/2/69  
(If no lien write word "none") (mortgage, note, conditional sale, etc.)

NAME OF LIENHOLDER Address City State

In favor of PACIFIC FINANCE LOANS 400 W. WASHINGTON, PHOENIX, ARIZONA

Amount of Lien, \$ Kind of Lien Date  
(If no lien write word "none") (mortgage, note, conditional sale, etc.)

NAME OF LIENHOLDER Address City State

In favor of

(SIGNATURE OF SELLER)

Subscribed and sworn to before me this day of 10

day of 10

## REASSIGNMENT BY DEALER

To be filled in by Arizona licensed dealer only, and then delivered with vehicle to the purchaser. FOR VALUE RECEIVED I (WE) HEREBY SELL AND ASSIGN TO, (This day of 10

NAME OF PURCHASER Residence Address City State

the vehicle described on the reverse side of this Certificate and I (We) hereby warrant the title of the said vehicle to be free from all liens and encumbrances except as follows:

Amount of Lien, \$ Kind of Lien Date  
(If no lien write word "none") (mortgage, note, conditional sale, etc.)

NAME OF LIENHOLDER Address City State

In favor of

Amount of Lien, \$ Kind of Lien Date  
(If no lien write word "none") (mortgage, note, conditional sale, etc.)

NAME OF LIENHOLDER Address City State

In favor of

Dealer License No. By (Signature of Dealer)

By (Authorized Agent)

## APPLICATION FOR TITLE

I (We) hereby make application for Certificate of Title in my (our) name on vehicle described on reverse side of this Certificate and state under oath that the information given above is true and correct.

Dated this 10 day of Feb 1969

(Applicant's Signature)

(Residence) (City) (State)

Mail Title to:  
(Mail to Division of Motor Vehicles, Phoenix, Arizona, with fee of \$1.00 for Title and fee for transfer of registration card.)



STATE OF ARIZONA  
Division of Motor Vehicles  
ARIZONA STATE HIGHWAY DEPARTMENT

Certificate of Title

Application for a Certificate of Title to the vehicle described below has been filed with the Division of Motor Vehicles by the person named as owner as required by law.

OWNER	ENRIQUEZ, ARNOLD B	CL-550834	TITLE NUMBER
ADDRESS	2022 E. MORELAND	2-7-19	DATE ISSUED
MAKE & TYPE	PHOENIX, ARIZONA		
MODEL & LIST	CADILLAC SEDAN	8584284	ENGINE NUMBER
UNLADEN WT.	1942 6269	8584284	SERIAL NUMBER
PRIOR REGIST.			AXLES & TIRES
LIEN HOLDER	ALA-REG-MAR-48	1942	DATE FIRST SOLD
AMT. & DATE	NONE		ADDRESS
			KIND OF

ADDITIONAL FILED LENS

(Lien Holder)	(Address)	(Kind)	(Amount)
---------------	-----------	--------	----------

The applicant has stated under oath that he is the owner of said vehicle and that it is subject to the above enumerated liens and no others and the facts stated in said application appear to be true.

IT IS HEREBY CERTIFIED that the above described vehicle has been registered in the office of the Division of Motor Vehicles and that the above registration number (title number) has been assigned to said vehicle and the owner thereof.

IN WITNESS WHEREOF the seal of the Division of Motor Vehicles of the State of Arizona is affixed on the date shown above.

NOT RECORDED  
NO PRIOR COURT

*[Signature]*  
Vehicle Superintendent

By

(Keep in a safe place do not accept title showing transfer otherwise)





(Testimony of Robert W. Lorenz.)

I hereby certify that as Supervisor of Titles of the Motor Vehicle Division, Arizona State Highway Department, all documents pertaining to bonafide registration and certificates of ownership concerning motor vehicles, are under my direct supervision.

I further certify that 1948 Arizona License No. AN2236 covering a 1942 Cadillac sedan bearing motor #8384284, serial number same, was issued in the name of Arnold S. Enriquez of 2022 E. Moreland St., Phoenix, Arizona, and covered by title #550834. This vehicle was sold to Mr. Enriquez on April 22, 1947, by Arizona dealer, Clark Smith. The first title in the name of Arnold S. Enriquez was developed and issued April 25, 1947. Subsequent titles, in the form of duplicates, new liens, clearances, were issued in his name until date of 2-7-49 at which time final title was issued in his name. Vehicle subsequently sold by Arnold S. Enriquez to John E. Durand of 42 S. 1st St., Glendale, Arizona. Our records disclose ownership still vested in the name of John E. Durand as registered owner with legal owner the Pacific Finance Loans of Phoenix, lien in amount of \$1134.72 in form of chattel mortgage dated 2-9-49. Title in name of John E. Durand developed and issued 3-16-49.

[Seal]     /s/ WM. F. BOWDEN,  
Supervisor of Titles, Division of Motor Vehicles,  
Arizona Highway Department, Phoenix, Arizona.

(Testimony of Robert W. Lorenz.)

I Hereby Certify that I am the Superintendent of the Vehicle Div., Arizona State Highway Department and that Wm. F. Bowden, whose signature appears on the certificate attached hereto is a Supervisor of Titles, Division of Motor Vehicles, Arizona Highway Department, and that as such he has custody of all documents of the department pertaining to bonafide registration and certificates of ownership concerning motor vehicles.

In Witness Whereof, I hereto affix my signature and the seal of the Motor Vehicle Division, Arizona State Highway Department.

[Seal]     /s/ C. L. LANE,  
Superintendent, Division of Motor Vehicles, Arizona Highway Department.

[Endorsed]:   Admitted and Filed April 26, 1950.

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Mr. Thurman:   Let the record show that the exhibit is being handed to the jury.

Q.   Now, what took place that you saw there yourself?

A.   At about—on July 22nd, just shortly before noon, I saw this Cadillac turn into the driveway of Mr. Elkins' home. It pulled directly in front of where I was concealed in a barn. I was about 30 feet from there. He parked, and Arturo, a man known to me as Arturo Jerez was [52] driving, and Elkins came out of the house and talked to him.

Q.   Well, go ahead, tell us what happened.

(Testimony of Robert W. Lorenz.)

A. I saw a hand to hand transaction. I saw a package, a sack handed to Elkins, and I saw Elkins count out money and pay the man.

Q. And what did Elkins do with this package; describe the package to the Court and jury, Mr. Lorenz.

A. The package was a brown paper sack. It had an object that was fairly heavy in it and after the transaction was completed Arturo Jerez backed the Cadillac out of the driveway and appeared to be driving back towards Tempe. Elkins stood there in the yard right in front of me until the car was quite some distance away. At that time he came directly to me and I took possession of the evidence, and it was dated and initialed at that time.

Q. What was this evidence that he gave you; describe it.

A. It was prepared opium in cans. There was five cans in the brown paper sack.

Q. And what did you do with those five cans in the brown paper sack, if anything?

A. After they were properly dated and initialed by [53] both of us, they were kept in my possession until they were brought to our office, at which time Agent Smith and I examined it and sealed the evidence.

Q. And sealed it, and then what was done with this evidence after it was examined by you and Mr. Smith at the office here in Phoenix?

A. It was sealed and sent by registered mail to the chemist.

(Testimony of Robert W. Lorenz.)

Q. And is that the ordinary way of handling such matters in your department?

A. It is.

Q. I hand you Government's Exhibit 4 and ask you to examine this and see if you can identify it, Plaintiff's 4 for identification. Do you know whether or not those are the four cans that Mr. Elkins handed you in his yard there at the time it was delivered to him by Jerez?

A. Yes, sir; these are the four cans.

Q. Now, this label on the outside, was that prepared in your presence, or did you prepare it?

A. Yes, sir; in my presence.

Q. And who did it?           A. Agent Smith.

Q. Is there anything about this piece of paper here that you have any way of identifying it? [54]

A. Yes, sir. My initials and the date are on it.

Q. Where?           A. Right here (indicating).

Q. In what color ink?           A. Light blue ink.

Q. Do you know who these are?

A. Yes, sir, that is Mr. Smith, the agent in charge.

Q. When was this blue ink put on there?

A. At the time Viron Elkins handed me that package.

Q. Now, after this delivery that you mentioned here, the 22nd of July, 1948, what did you do after that; what was your next step?

A. After I took possession of the evidence I returned to Phoenix with several other agents, and

(Testimony of Robert W. Lorenz.)

in doing so we drove by the Phoenix Mattress Factory at 1501 East Adams Street.

Q. And do you know who operates that, of your own knowledge?      A. Yes, sir.

Q. Who?      A. Ray Leyvas.

Q. And he was one of the defendants in this case, was he? [55]      A. Yes, sir.

Q. All right. Go ahead.

A. At that time we noticed the same Cadillac with the Arizona license plates AN-2236 parked adjacent to the building. That was just a short period of time, we had allowed it enough time to get back.

Q. About how long would you say?

A. Oh, within 20 minutes.

Q. All right. You saw a Cadillac there then at the mattress factory. Then what did you do?

A. We took the evidence up to the office immediately.

Q. Now, what was the next—when were you again on this case subsequent to July 22, 1948?

A. On August 19th I was again in Tempe.

Q. Sir?      A. I was in Tempe.

Q. All right, tell us about it. Who was with you and at the time you were over there, and give us a detailed account of it.

A. I was again at this same place concealed in the barn. This time Agent — Customs Agent Street——

Q. Street?

A. Yes—was concealed with me and I was again

(Testimony of Robert W. Lorenz.)

in [56] exactly the same location, and after this date we saw a '31 Chevrolet, green in color, turn into the driveway and park approximately in the same place. It was a small parking area there and it was about 30 feet from where I was concealed. I saw Arturo Jerez again at the wheel of this car, and Elkins came out of the house, walked up to the side of the car, and another transaction took place, and another brown paper sack was handed to Elkins, and I saw him pay the money to Jerez.

Q. Do you know of your own knowledge how much money he paid to Jerez? A. Yes, sir.

Q. What is it? A. \$1375.

Q. Is that the same amount he paid for the other five cans of opium? A. Yes, sir.

Q. Handing you Government's Exhibit 5 for identification, I will ask you to handle those and see if you can identify it. When you received this package from Mr. Elkins on the 19th day of August, did you mark the cans or the paper or anything at that time?

A. Yes, sir; that is standard procedure.

Q. And do you have any way of identifying that exhibit? [57]

A. Yes, by the date and the time and my initials right here.

Q. What is the date and what is the time?

A. 8-19-48, 1:30 p.m.

Q. Was anybody else's handwriting on there that you know of, put on there in your presence?

A. Mr. Elkins' should be on here.



(Testimony of Robert W. Lorenz.)

Q. Well, is it; can you tell?

A. I believe that is his right there, (indicating on exhibit). These are the cans all right.

Q. Can you tell the Court and jury whether or not those are the cans of opium that you received from Mr. Elkins on the 19th day of August, 1948, at his place in Tempe, Arizona?

A. Yes, sir.

Q. And what was done with that exhibit after you received it?

A. Well, it was turned over to me and it was again taken to the Narcotic Office.

Q. Then what was done with it?

A. With Agent Smith we examined it and sealed it and prepared it for the Government chemist.

Q. Now, after receiving the exhibit from Mr. Elkins on the 19th day of August, 1948, what did you [58] do besides take that to the office, if anything?

A. We again returned, and on returning to Phoenix, in going to the office, we went by the mattress factory, and that was at 1501 East Adams Street, and we saw the same car, a '31 Chevrolet parked between the mattress factory and 1505 East Adams, the home of Ray Leyvas.

Q. Now, when was the next time you appeared in this particular case as an investigator, Mr. Lorenz?

A. On December 16, 1948,—

Q. Just a second—all right, go ahead, December 16th, you said?

A. Yes, sir; December 16, 1948.



(Testimony of Robert W. Lorenz.)

Q. All right.

A. I was again at the residence of Mr. Elkins.

Q. Now, who was with you at that time, if anyone?

A. Agent Smith—Agent Earl A. Smith and Agent Teets.

Q. And who was Agent Teets?

A. A Narcotic Agent presently stationed in California.

Q. Where was he stationed at that time, if you know?

A. He was attached to this district at—— [59]

Q. I see. All right, what time of day was it that you got to the Elkins home on December 16, 1948?

A. Around 4:00 p.m. in the afternoon.

Q. Who did you meet at Elkins' home, if anyone, at that time

A. At that time Informer Elkins was there and us three agents.

Q. Where were you?

A. Concealed on the back porch.

Q. What in?

A. The back porch was covered with canvas blind and we had to let it down where we could not be seen.

Q. What became of Agent Earl Smith, this gentleman here?

A. Agent Smith, or Mr. Agent Teets was in the front part of the house where he could observe the surrounding grounds.

Q. Earl was with you on the back porch?

(Testimony of Robert W. Lorenz.)

A. Yes, sir.

Q. Now, what did you see while you were there, if anything, appertaining to this particular case?

A. Oh, at approximately 4:30 p.m., a red pickup truck drove into the yard. It was a truck of the Leyvas Mattress Factory, and I saw—— [60]

Q. Who was driving it, if you know?

A. Ray Leyvas was driving it.

Q. Anybody else with him? A. Yes, sir.

Q. Who? A. Art Leyvas.

Q. By "Art" you mean Arturo C. Leyvas, one of the defendants? A. Yes, sir.

Q. And by "Ray Leyvas" you mean Ray C. Leyvas, one of the defendants? A. Yes, sir.

Q. All right.

A. The truck pulled up very close to the back porch and at this time Ray Leyvas got off from behind the wheel of the car and took a mattress off the truck and talked to Mr. Elkins, and then they passed from my view. A short time later they both walked back to the car, and at this time Art Leyvas got out of the car, and Ray Leyvas introduced Elkins to him as his brother. There was a short conversation and——

Q. Who was this conversation between?

A. Between—the conversation then took place between Elkins and Art Leyvas. At about 4:48, I saw a package passed from Art Leyvas to Elkins which [61] I later ascertained was a small capsule——

(Testimony of Robert W. Lorenz.)

Q. All right, go ahead. Proceed. What did this package appear to be at the time you saw it; describe it.

A. It was just a small package, looked like a capsule.

Q. What do you mean by "capsule"?

A. Well, a small oblong object.

Q. Then what took place?

A. In a few minutes Art Leyvas got back in the truck, the truck backed out of the residence and appeared to be going back towards Tempe, and at that time why Elkins came into the house and we examined the object and found it to be a capsule with a white powder, heroin.

Q. What became of this capsule?

A. It was kept in our possession then.

Q. Was it ever sent to the chemist?

A. Yes, sir. After leaving the house, later that evening, why it was prepared like all other evidence, examined and sealed and sent to the chemist.

Q. I hand you Government's Exhibit No. 15 for identification and ask you to examine the contents of the exhibit, the contents in this white paper here. [62]

A. This is the capsule, is broken.

Q. That is the capsule you have already mentioned?      A. Yes, sir.

Q. Have you any other way of identifying it other than outside of the——

A. Yes, sir, my initials and the time on the paper.

(Testimony of Robert W. Lorenz.)

Q. Was this paper wrapped around it at the time you received it from Mr. Elkins, or when was that put on it?

A. It was on there when I saw it, yes. Whether it was on there before——

Q. When did you first see this?

A. When I put my initials on it. We added paper so that we could write it up for identification. There is no place on the capsule to write.

Q. After you got this capsule—who did you say gave it to you?

A. Mr. Elkins.

Q. Where were you when he gave it to you?

A. In the house of Elkins.

Q. And this sample was handled the same as all the rest you mentioned?

A. Yes, sir, identical.

A. All right. Immediately after getting this [63] sample what next did you do in the case?

A. We talked to Mr. Elkins and he stated that one of the——

Mr. Primock: I object to what he said as being hearsay.

The Court: Yes.

Mr. Thurman: That is right, don't tell what Elkins said at the time.

A. Elkins said——

The Court: No, never mind what Elkins said.

A. We examined the evidence then and waited there and waited at this same place until about 7:15 that evening.

(Testimony of Robert W. Lorenz.)

Mr. Thurman: 7:15. Where did you wait at that time?      A. Waited on the back porch.

Q. You and Smith still there?

A. Mr. Smith and I and Agent Teets in the front of the house.

Q. All right. Tell us what happened next.

A. At 7:15 a car drove part way into the driveway of this house, and because it was dark we were unable to see what it was. Elkins turned on the back porch light. I saw Art Leyvas walk into the light and walk up to the back steps about eight feet from where Mr. Smith and I were concealed. [64] Elkins came out of the house. He had a conversation. At this time, 7:17 p.m., Art Leyvas reached into his right coat pocket and brought out a package that he gave to Elkins. Elkins stepped inside of the house with the package, got the money, stepped outside and paid it to Art Leyvas.

Q. Can you describe the package that Arturo Leyvas gave to Elkins about 7:17 p.m. on that day?

A. It was an envelope, that is all I saw at the time.

Q. Did you see that envelope again after that?

A. Yes, sir.

Q. How soon after that?

A. Immediately after that.

Q. And where?

A. Right inside of the house. I was there; it was handed to us. We examined it.

Q. Again handing you Government's Exhibit 15

(Testimony of Robert W. Lorenz.)

for identification, will you examine it and see if you can find the exhibit that you have mentioned?

A. This is the package right here.

Q. And what was done with the package; was it handled similar to all the other packages that you have mentioned?

A. Yes, sir; it was initialed and dated at [65] that time by all present and kept in our custody.

Q. Was it sent over to the laboratory for analysis?

A. Yes, sir, it was sealed and sent up by registered mail.

Q. Now, what took place that you know of your own knowledge between Elkins and Arturo Leyvas at that time other than the mere handing of the exhibit to Elkins by Arturo?

A. There was a conversation in regards to narcotics that I overheard.

Q. Between who?

A. Elkins and Art Leyvas.

Q. What was said at that time and place by Art Leyvas to Elkins?

A. He was telling Elkins about some heroin and opium that they had on hand and also requested that if Elkins wanted any large amount, to try and have him give about a five-day notice.

Q. Now, when next did you appear in this matter as an investigator?

A. I don't know what the next date would be on there, whether it was——



(Testimony of Robert W. Lorenz.)

Q. Did you keep any record or anything that you can refer to?

A. Yes, sir; there was notes prepared at the—I [66] kept running notes every day I was on the investigation, just adding to them.

Q. Did you make these notes in your own handwriting? A. Yes, sir; in pencil.

Q. What kind of piece of paper or book did you keep that on? A. It was a penny postcard.

Q. Did you keep that record?

A. Yes, a continuous record so I could keep the investigation clear in my mind.

Q. Do you think you need that to refresh your memory at this time? A. Yes, sir.

Q. Well, look at it if you have to.

A. On January 14, 1949—

Q. Now, January 14, 1949, were you with any other officers that day?

A. Yes, sir; I was with Agent Smith and Agent Johnson.

Q. Any other narcotic agent?

A. No, sir; I believe that was all.

Q. All right, tell us what took place on the 14th day of January, 1949, concerning this case.

A. That evening about 9:00 o'clock, Agent Smith and I, in a Government car, were in the [67] vicinity of 1601 East Washington at the Piratas Club. We saw Agent Johnson enter this building and in a short time, at 9:20 p.m., emerge with Art Jerez. The two of them got in a Government car and drove north on 16th Street. We didn't follow



(Testimony of Robert W. Lorenz.)

them any closer at the time but immediately drove up to 1030 East Moreland Street, the house of Art Leyvas and Connie Duarte. At this time a Cadillac belonging to Enriquez was parked in front——

Q. In front of where?

A. 1030 East Moreland. We kind of cruised around the neighborhood and at 10:00 p.m. returned in front of 1030 East Moreland and saw the same Cadillac parked there, and in addition a 1941 Chevrolet with a Louisiana license plate, the number was 338799. We noted this, and then met Agent Johnson, and at this time Agent Johnson turned over a package to us, which was dated and initialed.

Q. What sort of a package was it?

A. It was a sack containing four cans of opium, paper containing——

Q. Now, referring again to January 14, 1949, did you do any other work that day?

A. Yes, sir. [68]

Q. And give the name of the agents that were with you that day?

A. There was Agent Earl Teets and Agent Smith and I.

Q. All right. Now, with respect to the activities of yourself, Earl Smith, and Narcotic Agent Earl Teets, what did you do, of your own knowledge, on January 14, 1949, with respect to the case?

A. Agent Smith, Agent Teets and myself met Elkins at that time. We searched him and gave him some marked money and searched his car. Agent Teets got in the rear of the trunk of the car,

(Testimony of Robert W. Lorenz.)

concealed himself, and Elkins drove to 1030 East Moreland, the house of Art Leyvas and Connie Duarte. He was followed by Agent Smith and I in another car at some distance. When he got up to the house at 1030 East Moreland, he got out of the car and knocked on the door, and I believe Connie Duarte came to the car. We saw him talk for a few minutes and then saw her re-entering the house, and Elkins was beginning to get into his car, and just as he was getting into his car Connie Duarte ran out of the house and hollered at him, and I saw him then sit in the car. A few minutes later we saw the '41 Chevrolet coupe with [69] the Louisiana license drive up and park behind Elkins' car. At this time Art Leyvas got out of the car and came up and talked to Elkins at his car, talked for a few minutes. Art Leyvas then went into the house at 1030 East Moreland and in a few minutes he again came out of the house and approached Elkins on the driver's side of his car and had a hand to hand transaction, saw a package passed, and saw Elkins count out some money. We observed this from about a half block, not quite a half block.

Q. You say you gave Elkins some money after you searched him. How much money did you give him?

A. It was \$50 marked Government money.

Q. Then what took place?

A. After the transaction, Art Leyvas returned to the house, Elkins drove away and we followed, keeping them in sight and followed them at a

(Testimony of Robert W. Lorenz.)

distance until we were well away from the vicinity of the neighborhood and out of town a ways, at which time we overtook Elkins and at this time he gave the exhibit to us and it was dated and initialed and examined.

Q. Handing you Government's 17 for identification, I will ask you to examine that and see if you can identify the exhibit that was ultimately [70] given to you by Elkins on the date that you have mentioned?

A. Yes, sir; these are the ones.

Q. Were these handled the same as the other exhibits? A. Yes, sir; identically.

Q. They were all sent to the laboratory?

A. They were sealed and sent by registered mail to the United States Chemist.

Q. Do you remember how long Mr. Teets stayed in the trunk of Elkins' car, if you know?

A. Oh, it was approximately 45 minutes to an hour, I believe.

Q. Now, when next do you appear here in this matter? A. I believe it was February 6th.

Q. The early part of February. You fix it the 6th, you say? A. Yes.

Q. Well, the next time you appeared in the case, what happened; what do you next personally know of?

A. It is possible I could have appeared sooner, I believe, if I can refer to my notes.

Q. Well, do it if you have any doubt, you have a record there, why, refer to it. [71]

(Testimony of Robert W. Lorenz.)

A. (Referring to memorandum): On January 15th, the next day——

Q. What happened on January 15th, then?

A. Agent Smith and I met Informer Charles Cobos.

Mr. Thurman: We don't know whether Cobos will be here or not, so we can't use it.

Mr. Primock: I move that that be stricken and the jury admonished to disregard the remarks of counsel.

Mr. Thurman: We don't know if Cobos may come, I don't know.

The Court: All right.

Mr. Thurman: We certainly agree to have it stricken if he does not show, your Honor.

The Witness: On February 2nd was the next one.

Q. Now, will you please tell us what happened on February 2, 1949, to the best of your recollection?

A. On February 2nd, Agent Earl Smith, Agent Teets, and I again met Elkins. He and his automobile were searched. He was furnished with marked Government money.

Q. How much, do you remember?

A. I don't remember.

Q. All right.

A. And they drove to 1030 East Moreland [72] again, and he met Art Leyvas and Connie Duarte at 10:50 in the morning; 10:50 a.m. Connie Duarte came out of the house and came to the car.

(Testimony of Robert W. Lorenz.)

Q. Where were you at that time?

A. I was diagonally from the house less than a half block distance. I had a pair of high-power field glasses.

Q. You were not in Elkins' car at this time?

A. No, sir; I was not. Agent Teets was.

Q. Whereabouts was Agent Teets in Elkins' car?

A. He was again concealed in the trunk of the automobile.

Q. He was—who was driving this car?

A. Elkins was driving the car.

Q. What time of day did you say it was?

A. That was about 10:50 in the morning.

Q. What did you see at that time and place?

A. I saw Connie Duarte leave the house and come out to the car and after several minutes of conversation with Elkins, why, she left the car and re-entered the house. In a few minutes she again came out and approached the car, and at this time I saw a package passed and money passed. After a short conversation, Connie again left the car, returned to the house, and Elkins drove off. He was followed by us. [73]

Q. All right. What did you do after Elkins drove away?

A. We again followed them from a distance, he never left our sight. We were careful that we weren't observed.

Q. Followed who?

A. Elkins' car away from that vicinity and then stopped them and he handed the evidence to us.

(Testimony of Robert W. Lorenz.)

Q. How far did you follow him before you stopped him, approximately?

A. Well, it would be approximately within several miles.

Q. Huh?

A. Within a mile and a half or two.

Q. Of the place—— A. Yes, sir.

Q. And then what happened—who was with you at the time you stopped Elkins?

A. Agent Smith was with me.

Q. Agent Smith, this gentleman here on my right, Earl A. Smith? A. Yes.

Q. And what took place between you and Agent Smith and Mr. Teets and Elkins, if anything?

A. The evidence was handed to me and it was examined, and he initialed and dated it at that [74] time.

Q. Handing you Government's Exhibit 20 for identification, I will ask you to open the envelope and see if you can identify the contents of that exhibit. A. Yes, sir, this is the one.

Q. How do you identify it?

A. By my initials and the date and also that sealed package, the same thing.

Q. Did Elkins initial it at that time?

A. Yes, sir.

Q. You saw him put his initials on there?

A. Yes, sir; that was done in my presence.

Q. And this exhibit was also sent to——

A. Yes, sir, it was sealed and sent by registered mail.



(Testimony of Robert W. Lorenz.)

Q. To the laboratory for analysis?

A. Yes, sir.

Q. Now, when did you appear again in this picture in the capacity of an investigator?

A. February 6th.

Q. February 6th, Nineteen Hundred and what?

A. '49.

Q. Was anyone with you on this particular date?

A. Yes, sir; Agent Smith——

Q. Just a minute, we had better skip the 6th. When [75] did you appear again after February 6th?

A. Again on the 8th of February, 1949.

Q. All right, on February 8th, 1949; who was with you? Go ahead and tell us what you did.

A. February 8th or 6th?

Q. February 8th.

A. On February 8th, Agent Smith was again with me and at this time we were in the vicinity of 1018 South First Street.

Q. Did you know of a narcotic agent or customs agent by the name of Harry Bumph and Fred Parkinson?

A. Yes, sir; I do.

Q. Do you remember if you ever did any work for Bumph and Parkinson and Agent Earl Teets?

A. Yes, sir.

Q. On or about February 8th, 1949?

A. Yes.

Mr. Primock: I am going to object to the United States Attorney trying to impeach his own witness.

Mr. Thurman: I am not trying to impeach him.



(Testimony of Robert W. Lorenz.)

I am trying to refresh his memory simply, that is all. I don't have to impeach this witness.

A. Well, on February 8th I was covering 1030 East Moreland Street again. Customs Agent Bumph and [76] Parkinson were with me. We were parked about a half block away concealed behind a hedge of bushes watching the rear door of 1030 East Moreland. We observed the car of Informer Elkins drive up. Just previous to our arriving there, we had searched the informer and again at this time Agent Teets had concealed himself in the rear of his car in the trunk.

Q. What did Elkins do?

A. Elkins drove up to 1030 East Moreland and got out of the car. He went up to the house. I am not quite sure, I will have to go back to my notes then.

Q. If your notes will help you.

A. No, I don't have that. I saw—I believe that it was Art Leyvas again came to the car.

Q. And what was done when Art Leyvas went to the car?

A. There was—let's see, when Art came out of the house and went to the car there was another exchange of a package and money.

Q. What became of the officers Bumph and Parkinson?

A. They were with me, right with me at that time in the car.

Q. Did you see any exchange of money or pack-

(Testimony of Robert W. Lorenz.)

ages [77] between Elkins and the defendant, Arturo Leyvas, at that time that you remember of?

A. Yes, sir; there was.

Q. What happened; did you hear any conversation at that time and place?

A. No, sir. I was too far for any conversation.

Q. About how far were you?

A. I was approximately a half block away with field glasses.

Q. Now, what happened after the exchange that you could see with those field glasses; what took place then?

A. I believe it was on that date that—after the exchange the defendant drove off, or Elkins drove off in his car.

Q. And do you know where Teets was during all of that time?

A. Yes, he was still concealed in the trunk of the automobile.

Q. What automobile?

A. The car of Elkins.

Q. Subsequent to the time that Elkins—when Elkins drove away with Teets in the back of the car, as you have testified to, what next did you do in the case; what happened?

A. We again followed them away, a safe distance from there, stopped the automobile and [78] conferred with Agent Teets and Elkins and received the exhibit.

Q. Where was Teets when you stopped the car?

A. He was still in the trunk.

(Testimony of Robert W. Lorenz.)

Q. He got out, then?

A. That is right, we had to let him out.

Q. What took place then when you stopped the car?

A. The evidence was dated and initialed and examined.

Q. Who gave you the evidence?

A. Mr. Elkins.

Q. Would you recognize it if I was to hand it to you?

A. Yes, sir; it should have my initials and the date on it.

Q. I hand you Government's Exhibit 24 for identification, and I will ask you to examine this exhibit and see if you can identify it.

A. Yes, yes, that is my initials and it is here.

Q. What about this piece of paper?

A. That was wrapped around the package.

Q. Who wrapped it on there?

A. It was that way when I received it.

Q. From Elkins? A. Yes, sir. [79]

Q. Did Elkins sign that thing, too, or initial it?

A. Yes, there is his initials right there (indicating).

Q. And it was sent to the laboratory, was it, for analysis?

A. Yes, sir, it was sealed and sent by registered mail.

Q. This particular exhibit here, this type of envelope that is used in your department in sending materials of that kind for analysis to the laboratory?

(Testimony of Robert W. Lorenz.)

A. Yes, sir; it has a locking device on it.

Q. They are all the same, are they?

A. Yes, sir.

Q. What was one of the last acts you did in this case?

A. On February 15th, 1949, the arrest of all defendants were contemplated and early on the morning of February 15th, we began surveillance with other officers, relief officers, at 1030 East Moreland Street. Early in the morning, about 2:45 a.m., we—when we came on that shift at 1:00 a.m. the Cadillac AM-3226 was parked in front of 1030 East Moreland. About 2:45 a.m. we saw that car depart from there with three men in it, but we [80] lost it temporarily and by crisscrossing picked it up at approximately Eleventh Street and East McDowell Road. At that time I was driving the Government car and I swerved in front of them and stopped them and Pirata. Joe Martinez and Mike Sandoval were in the car.

Q. Who is "Pirata"?

A. Arnold Enriquez.

Q. The defendant who sits here?

A. Yes, sir; that is his nickname, "Pirata."

Q. Who was driving the car at that time?

A. Arnold Enriquez.

Q. Go ahead.

A. They were stopped at 3:00 a.m. in the morning and we searched them and taken them into custody at that time.

Q. And that car that the defendant Arnold

(Testimony of Robert W. Lorenz.)

Enriquez was driving on February 15th, 1949, did you say that was the same car that you saw in July of '48?

A. Yes, sir; that was the same car I saw on July 22nd, 1948.

Q. At the Elkins home?

A. Yes, sir; it had the same license and all.

Mr. Thurman: You may cross-examine. [81]

### Cross-Examination

By Mr. Primock:

Q. Mr. Lorenz, how long have you been a Federal Narcotic Agent? A. Since '47.

Q. And all of the time you served here in Phoenix? A. That is correct.

Q. You work on a straight salary, do you not?

A. Yes, sir.

Q. You don't get so much a case like the Informer Elkins does? A. No, sir.

Q. Now, directing your attention to July 22d, 1948, at Tempe, what time of day did you get there?

A. Got there about 11:30 in the morning.

Q. In the morning? A. Yes, sir.

Q. And you saw a transaction between the defendant, one of the defendants, Art Jerez, or Jerez, and Elkins, is that correct? A. Yes, sir.

Q. Did you see this defendant Arnold Enriquez at that spot? A. No, sir.

Q. At that time I believe you said you took [82] four cans into your possession from Elkins.

(Testimony of Robert W. Lorenz.)

A. Five cans.

Q. Five cans, and those five cans are this Exhibit 4 here, is that correct, these are the cans, are they, that you took into your possession at that time and place?

A. No, those are not the ones.

Q. Where did you take these into your possession?

A. August 19, 1948.

Q. That is August 19, 1948?

A. Yes, sir.

Q. Those were taken into your possession in Tempe, were they not?

A. Let's see—yes.

Q. And those were given you, were they not, by Mr. Elkins?

A. That is right.

Q. Now, Mr. Lorenz, outside of the wrapping and the markings and looking at the individual cans themselves, can you truthfully state under oath that those individual cans are the same cans that were given you at that time and place?

A. Outside of the initials and markings?

Q. On the wrapping paper, outside of anything on the wrapping paper, looking at the individual cans themselves, can you state under oath that [83] those are the same cans that were given to you on August 19th, 1948, by Mr. Elkins?

A. Yes, sir.

Q. Not that can, there are cans, other cans identified as little cans were the ones?

A. No, this is the exhibit you just handed me.

Q. There is some little cans in here.

A. Here is my initials "R.W.L."

Q. They are on each one of those cans?

(Testimony of Robert W. Lorenz.)

A. Yes, sir.

Q. Are they on all of them together or are you telling from the top one only?

A. I put them on each can.

Q. Now, you said you gave——

Mr. Thurman: Just a minute, you got a question there and I want him to answer it.

Mr. Primock: I thought he answered it.

Mr. Thurman: No, he hasn't answered it, I would not have objected to it.

The Witness: I can't get them apart. My initials are on the can here. Here is one on this one, and all the cans are similar. They were all in the same package that I initialed and dated. They never left the package.

Q. (By Mr. Primock): Now, Mr. Lorenz, excuse me, are you through with the answer? [84]

A. Yes.

Q. You say on August 19th you gave Elkins \$1375 to buy those cans?

A. Let's say I didn't give it to him, money at no time.

Q. Were you present at the time the money was given to him? A. Yes, sir.

Q. Do you recall the denominations of that money?

A. No, I don't have a record of it.

Q. Was the money marked? A. Yes, sir.

Q. What type of marking was put on the money?

A. All the serial numbers was recorded.



(Testimony of Robert W. Lorenz.)

Q. Just the serial numbers?

A. The series and serial number.

Q. There was no individual marking put on by you?

A. No, sir; I didn't put any of it on.

Q. To you knowledge, and in your presence there was no markings put on that money?

A. No, sir.

Q. Now, on August, or rather February 15th—no, strike that. On July 22d, 1948, also \$1375 was given to Informer Elkins, is that correct [85]

A. Yes, sir.

Q. Were you present when that money was given to him? A. Yes, sir.

Q. And was there any specific markings put on that money except recording the serial number?

A. No, sir.

Q. Mr. Lorenz, all the notes that you took as you went along on this case were recorded on that one postcard? A. No, sir; they are not.

Q. But that one postal card is a part of the notes, is it? A. Yes, sir.

Q. You made that up as you were going along?

A. Yes, sir.

Q. And how many other postal cards did you make up? A. I have no idea.

Q. Approximately how many?

A. It has been recorded on different sheets of paper, not all cards.

Q. You have other notes which were recorded on other sheets of paper? A. Yes.

(Testimony of Robert W. Lorenz.)

Q. Do you have those with you? [86]

A. No, I don't.

Q. You are going to trust your memory except as to what is on the postal card?

A. That is true.

Q. Now, on August 19, 1948, in Tempe, did you see this defendant Arnold Enriquez ever in Tempe on August 19th, 1948? A. No, sir.

Q. I believe you stated that a green '31 Chevrolet drove up on August 19th, 1948?

A. That is correct.

Q. What was the license number of that '31 green Chevrolet? A. AJ-1814.

Q. AJ-1814, you are sure of that?

A. Yes.

Q. Now, on December 16th, 1948, I believe you saw a pickup truck drive over into Tempe and another hand to hand transaction took place with Informer Elkins? A. Yes.

Q. On that particular date, at that particular time and place, did you see this defendant Arnold Enriquez? A. No, sir.

Q. What was the license number of that pickup truck [87] on that date? A. 34603-A.

Q. 34603-A? A. 34603-A.

Q. 3-A or 38? A. Yes.

Q. You are sure of that license number?

A. Yes, sir.

Q. Was this recorded on your notes that you have in your possession?

A. I believe it may be, but I——

(Testimony of Robert W. Lorenz.)

Q. Would you take a look and see if they are——

Mr. Thurman: I object, I don't see the materiality whether it is on that slip or not. If he is correct, he is correct.

Mr. Primock: Well, we will withdraw the question. It is all right, we will withdraw it.

Mr. Thurman: I mean challenging his notes.

Q. (By Mr. Primock): Now, on January 14, 1949, I believe you stated you were at Sixteenth Street and Washington and you followed Agent Johnson and Arturo Jerez, is that correct?

A. No, sir; I didn't follow them.

Q. Well, you saw them get out of the car and followed them for a block or two, didn't you?

A. I saw them leave the club. [88]

Q. Didn't you follow them at all?

A. No, sir.

Q. Wasn't that your testimony, that you followed them for a block or two on North Sixteenth Street?

A. I saw them drive north on North Sixteenth.

Q. You didn't follow them at all?

A. No, sir.

Q. You don't know what happened?

A. No, sir.

Q. Did you see Arnold Enriquez at that time?

A. No, sir.

Q. Now, on February 2nd, 1949, when you drove by the home of Connie Duarte and Arturo Leyvas,

(Testimony of Robert W. Lorenz.)

which I believe you stated was what address on East Moreland?      A. 1030 East Moreland.

Q. 1030 East Moreland, and you saw another hand to hand transaction take place, is that correct?

A. I will have to refer to my notes.

Q. Well, refer to your notes and tell us whether or not you testified on direct examination that you saw a hand to hand transaction on February 2d, 1949, on East Moreland?      A. That is correct.

Q. And at that time and place did you see this [89] defendant Arnold Enriquez?

A. No, sir.

Q. Now, on February 8th, 1949, you testified that you and Agent Smith went down to 1030 East Moreland and parked another half block away and related the same story that you saw a hand to hand transaction with Elkins and Arthur Leyvas, did you testify to that?      A. Yes, sir.

Q. And at that time and place did you see this defendant Arnold Enriquez?      A. No, sir.

Q. And the first time you saw Arnold Enriquez was February 15, 1949, is that correct?

A. That is correct.

Q. I believe you testified Arnold Enriquez was driving a Cadillac automobile on this morning, the morning of the arrest?

A. Yes, at 3:00 a.m., I believe it was.

Q. Did you search Arnold Enriquez at that time?      A. Yes, sir.

Q. Did you find any narcotics in his possession?

A. No, sir.

(Testimony of Robert W. Lorenz.)

Q. And, as a matter of fact, Mr. Lorenz, all your testimony and all you know is concerning all the other defendants in this case excepting Arnold [90] Enriquez, is that correct?

A. What I have testified to.

Q. That is all—oh, one further question. These two license numbers that you gave me on the green Chevrolet and the red truck, was that the '48 license plate or '49 license plate?

A. This was a '48 license plate.

Mr. Primock: That is all.

Mr. Thurman: That is all.

(The witness was excused.)

The Court: Well, it is time for our afternoon recess. We will have a five minute recess, gentlemen. Keep in mind the Court's admonition.

(A short recess was taken.)

(After recess, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

The Court: You may proceed.

Mr. Thurman: Mr. Okla W. Johnson.

## OKLA W. JOHNSON

was called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

## Direct Examination

By Mr. Thurman:

Q. Please state your name. [91]

A. Okla W. Johnson.

Q. Now, Mr. Johnson, where do you live?

A. San Antonio, Texas.

Q. How long have you live in San Antonio, Texas? A. Oh, about eight years.

Q. Now, during the years of '48-'49 and at the present time have you held any official position with the Federal Government of the United States?

A. Yes, sir; I am a Federal Narcotics Agent under the Treasury Department.

Q. And how long have you been such narcotic agent? A. A little over eight years.

Q. And do you have occasion in that capacity to investigate cases in the State of Arizona and Texas?

A. I do.

Q. Now, did you have occasion, Mr. Johnson, in your capacity as a narcotic agent, to make investigation of the case now on trial before this Court?

A. I did.

Q. And what officers did you associate yourself with in that investigation?

A. I came here under instructions from, of [92] course, my District Supervisor, and was to work directly with Agent Smith.

(Testimony of Okla W. Johnson.)

Q. This gentlemen here?

A. And, of course, Mr. Lorenz here. I mean with this office, in other words.

Q. In your activities in this particular investigation, did you become acquainted with Arturo C. Leyvas?

A. I did.

Q. And Arnold Enriquez, the defendant in this case?

A. Yes, sir.

Q. And Ray C. Leyvas, the brother of Arturo C. Leyvas?

A. No, sir.

Q. You don't know him?

A. I know him now, but I didn't know him during this investigation?

Q. Connie Duarte?

A. Yes, sir.

Q. Arturo E. Jerez or Jerez?

A. Yes, sir.

Q. And Joe Martinez?

A. Yes, sir.

Q. Now, when did you first come to Phoenix on this case under the direction of your superior? [93]

A. I arrived in Phoenix on the night of September 23d, 1948.

Q. And how soon after you landed here did you meet any of the defendants whose names I have mentioned?

A. I first met Colimo, as I knew him for some time, and who I will refer to so we won't get mixed up with the two Jerez as "Colimo."

Q. As "Colimo"?

A. He is Art Jerez.

Q. When did you first meet him?

A. Well, I met him through another acquaintance I had met here. When I first came I met a



(Testimony of Okla W. Johnson.)

man by the name of Frank Colbert who I was to work with, and he knew a great many people I was to work with. Through him I met a fellow by the name of Joe S. Araga, a Mexican boy who hung around the corner of Second Street over here, and I ran around with him for two or three days, and on the 26th of September I had occasion to be up at the Pan-American Club on the corner of Sixteenth and Washington.

Q. Here in Phoenix, Arizona?

A. Here in Phoenix, Arizona, where I met the defendant in this case, Arnold Pirata, as I knew him at that time. That is where I was introduced to [94] him by Colbert and Joe S. Araga on the night I first went out there. I also met Joe Martinez that night and met Colimo—Art Jerez on that same night, and of course, several other people. During that evening I was taken into the Pan-American Club by having Joe S. Araga vouch for me and also Frank Colbert, and I was given a membership card to the Pan-American Democratic Club, which was the old Pirata Inn at the corner of Sixteenth and Washington here in this City. I have that card here, which is signed by Joe Martinez, President, and I don't know who this Lucille Tapia is, but she is the girl that issued the card after I had been introduced there and taken into the Club.

Q. The signature on that card by Joe Martinez, do you know of your own knowledge whether or not that is the same Joe Martinez who is one of the defendants in this case?

A. I do.

(Testimony of Okla W. Johnson.)

Q. Is it or is it not?

A. Yes, sir; it is the same, yes, sir.

Q. And was this defendant here, Arnold Enriquez, a member of that organization?

A. I don't know.

Mr. Primock: Just a minute, I object as [95] not the best record.

The Court: The witness said he doesn't know.

Mr. Thurman: He doesn't know, and about what time of the day was it that you first met these people at the Club that you mentioned?

A. This was along about six in the evening, and I stayed there and we had some drinks and played the slot machines, and so on, I guess, until ten o'clock, and it was about that time when I got my membership card, and when everything was fixed up. Incidentally, you have to have a membership card to get in because they had slot machines and other things.

Mr. Primock: I am going to object to the materiality of this.

Q. (By Mr. Thurman): Then what took place with respect to this case after you became a member of the Club?

A. I talked with Joe S. Araga at that point, and I had been talking with him prior to that about buying marijuana, or buying some mud that we had been calling opium.

Mr. Primock: I move that that be stricken on the grounds of hearsay.

The Court: Go ahead.

(Testimony of Okla W. Johnson.)

A. I gave Joe S. Araga \$25 and I saw him go [96] directly to Colimo—Art Jerez, and talk with him, and then Art Jerez left the Club. Frank Colbert was there, and he was called out of the Club by Colimo, and went out into the back yard and then came and called for me to come out and he had what was supposed to be 50 marijuana cigarettes. There was only 46 in the package, and I received those from Frank Colbert on that night.

Q. (By Mr. Thurman): Well, what happened after that with respect to any of these defendants in this particular case?

A. It was on the 28th, then, that I was there at the Club, and Joe Martinez—

Q. 28th of what?

A. 28th of September, just two days after I purchased this marijuana. I was at the Club, and Joe Martinez and Arnold Pirata and a fellow by the name of Haywood and two or three others were getting up a poker game. I was invited to get into the game in the back room at the Club. This I didn't do at the time. That was the second occasion, although I had met this defendant and had been in his company. I left the Club shortly after they started a game, and I didn't see them any more then until about the 3d, I believe, of November, was the first actual contact I had had [97] with anybody in the Club. I had been talking with Colbert and with Joe Araga, and they had been talking with Colimo, and on Sunday afternoon—I want to check that to be sure it was Sunday afternoon, I recall

(Testimony of Okla W. Johnson.)

very definitely, it was October 3d I met Colimo down town. I had been in a bar where Frank Colbert was, and he had a talk with Colimo on the phone. I knew what they had talked about although I didn't enter into the conversation. Colimo met me on the corner of Second, and I believe it was Washington, and asked me if I had seen Joe S. Araga. I told him that I had not, that I had been looking for him and could not find him. He said, "Well, I will go up here at another bar on Washington and see if I can get him," and he said that I should wait right there, and I waited at this corner and waited and watched for Joe S. Araga. I didn't see him. Pretty soon Colimo came up and he said, "I can't find him, I guess we will have to go through with this deal without him." Then he said, "Have you got your car? Let's get off of this corner, it is too hot," and I had a Government car parked just a short ways from there. We both got in it and he directed me to drive to Third Street and down across the railroad tracks for a couple of blocks [98] and then back around on Second Street where he directed me to park in front of a small Mexican cafe beside about a '38 Chevrolet. Colimo got out of the car and walked over to this Chevrolet on the left hand side by the steering wheel and reached inside of the car without opening the door, and just reached in through the window and picked up a small envelope which he brought over to the car and he said, "Have you got the money?" I said, "Yes, I have \$50." "Well," he said, "Here is 50

(Testimony of Okla W. Johnson.)

fun.” That is Chinese weight for opium, that comes in small weights, in a small amount.

Q. How do you spell that?

A. Fun—f-u-n. I received this jar from him and then he said, “Well, now here is two more I am going to give you on consignment,” he said, “I have got it out there and I don’t want this small stuff laying around,” and he said, “I have been talking with Frank.” He said, “I think you can move it and I think you will pay me, I am in no special rush for the money, but I don’t want no small stuff around.” He left two 25 fun jars which he said I could pay him. He said, “That extra 50 fun you can pay me for any time you can get the money.”

Q. And when he spoke of Frank, who did you have [99] reference to?

A. Frank Colbert. Frank was not present at that time. He was on duty working and he had talked with Colimo on the telephone and I had carried on with the plan by myself working with Colimo.

Mr. Primock: If the Court please, I am going to object to this witness reading from some papers unless counsel inquires what those papers are.

The Court: All right.

Q. (By Mr. Thurman): Did you make any notes?

A. This is a memorandum that I made after each time I talked or met with any of these people. I, of course, could not write at the time I was with them, but when I got home I sat down, wrote a

(Testimony of Okla W. Johnson.)

memorandum up for them so the office would know what I had been doing, and so I would have a complete memorandum of what happened.

Q. At the time did you make any lead pencil notations?

A. It was impossible for me to do that working with these people on the street.

The license number of that car was AA-599 on the Chevrolet that was parked there that he took the opium out of.

Q. What color was the car? [100]

A. Just an old black one, as I recall it. It didn't impress me very much at the time, but I did get the number.

Q. I hand you Government's Exhibit 6 for identification, Mr. Johnson. I will ask you to examine it and see if you can identify it.

A. This is a 50 fun jar, has my initials on there, O.W.J. 10-3-48, and the other officer's initials are also on here who I turned it over to.

Q. Who did you turn it over to?

A. I turned it over to Earl Smith.

Q. What is that, a 50 fun jar?

A. It is 50 fun.

Q. Did it have Internal Revenue stamps on it?

A. No, sir.

Q. Cancelled, or otherwise?

A. No, sir, none whatever.

Q. What about the other?

A. This is one 25 fun and here is the other. They both have my initials "O.W.J." and have the date



(Testimony of Okla W. Johnson.)

that I received them, and they are in the same condition that they were when I received them. It was wrapped in this tissue and this envelope. Says "Luis Jerez." He is the brother of Colimo whom I was dealing with, and it was delivered to me——

Mr. Primock: If the Court please, I am going to object to this witness continually talking without counsel asking the witness questions.

Mr. Thurman: I think he has answered the questions as to the identification of this particular exhibit, and he is telling about how it was wrapped.

Mr. Primock: He is telling stories about what is written on there, somebody's brother.

The Witness: This is the envelope I received it in. I received this fun in that envelope from Colimo and it has his brother's name on it.

Q. (By Mr. Thurman): That is the way you identified this exhibit?           A. Yes, sir.

Q. You are positive?

A. I am absolutely positive.

Q. Who did you say you gave it to?

A. Mr. Smith.

Q. Now, at the time that you got this from Colimo, as you testified, did he have any authority or form issued in blank for that purpose by the Secretary of the Treasury of the United States as required by the Act?           A. No, sir.

Q. Now, after making this particular pur- [102]



(Testimony of Okla W. Johnson.)

chase that you mentioned, what next did you do?

A. I spent, of course, a great deal of my time at this club because I knew that is where I was going to meet everybody that I was interested in, and on October 5th, I paid Colimo \$25 for one of the jars that I had purchased before and had not yet paid Colimo for. I had a little conversation with him at that time about buying a larger can of opium, and he told me they weren't available just now, but within a few days they would have a supply. On October 10th I again met Colimo, I met him in the front end of the bar, but before Colimo came in I had been talking with Haywood and Art Leyvas in the bar, and although I didn't know Art, I had gotten quite well acquainted with Haywood. He had come over to me on two or three occasions and said something to me and we held a little conversation and then he would go back talking with Art. A short time later Colimo came in and he was accompanied by the defendant in this case, Arnold Enriquez, and Arnold Enriquez and Leyvas and Haywood and Colimo were all having quite a conversation at the right hand side of the bar, and I had been sitting down near the middle or more nearly toward the left end of the bar. Two or three times during this time, Haywood came [103] over and talked to me and then went back to the crowd, and Colimo came over and talked to me on two occasions and went back, and I called Colimo out a little ways from the rest of them and he said, "We were talking about you," and we sat there and had a conversation about buy-

(Testimony of Okla W. Johnson.)

ing another 50 fun of opium, and I told him I wanted to pay him \$25 that I had gotten, and I wanted another 50 fun and if I could buy a larger quantity. He said, "Well, go ahead and finish your beer, I will see what I can do," and he went back to this group and talked, and Arnold Enriquez was present at that time. I didn't hear anything what was said, but they talked with Art Leyvas and Enriquez and Haywood, they were just in conversation there and I sat up to the bar and in about five minutes later Colimo called to me and says, "Follow me," and we went into the place next door, which is a little cafe that has previously been mentioned in the testimony here, which is just south, I believe, anyway it is probably at 603 on the same side of the street as Pirata's in, and we went in there and ordered a couple of cokes and he said, "I will be back in just a second," and he went out and turned the corner, went around toward the back and was out of my sight. He came back in probably three minutes, sat down, drank his coke with [104] me, and he said, "Have you got the money?" Meanwhile I counted out \$75, put it in my shirt pocket, and I just slipped it to him and I said, "Here is the money." He said, "Follow me." We drank our cokes, went outside of the building, went toward the back, and he stopped, handed me a 50 fun jar. He said, "That makes us all even. What you got from me before is all paid for." He asked me not to go back in the club. He said, "Don't go back in the Club unless you have to, but I'd rather you not go

(Testimony of Okla W. Johnson.)

back in the Club." I said, "That is perfectly all right. I will go around through the courts and get in my car and leave."

Q. (By Mr. Thurman): Handing you Government's Exhibit 7 for identification, see if you can identify the exhibit.

A. There are my initials, "O.W.J." and the date 10-10-48.

Q. And stamps on it?

A. There is no stamps, no, sir. On this there is also my initials, date 10-10-48. There is no stamps on that one either and they were wrapped in this paper when I received them.

Q. What did you do with those exhibits?

A. I turned them over to Mr. Smith.

Q. He had no permit from the Secretary [105] of the Treasury to purchase these, did he, to sell them, rather?

A. Not that I know of.

Q. Did he show you any or furnish you any?

A. No, sir.

Q. What day was that, did you say?

A. It was on October 10th, 1948.

Q. After making this purchase of this Government's Exhibit 7 for identification, what did you next do in this matter, Mr. Johnson?

A. On the afternoon of October 29th—No, take that back, it was on the evening of October 29th, I went to the Club about 8:00 p.m., the same club on the corner of Sixteenth and Washington, and I waited for Colimo and talked to him and he said that—I talked to him at this time about some

(Testimony of Okla W. Johnson.)

heroin, and he told me that the stuff was too high. I told him that I wanted to buy for someone that I knew who used it, and that was the only reason I was interested in it. At that time he said it was too high, he wasn't handling any at that time, that I'd have to buy three or five pieces, and if I bought that much they would be worth \$500 a piece, and it had been so high he had not handled any of that. I talked to him about some opium and he said at that time that there [106] was a fellow here who was going back to Mexico and he had some stuff he wanted to sell for \$180 a can, and he said he could get me three or four cans of it if I wanted to buy it. I had quite a bit of conversation with him and he said he would give me a real good buy on this and it was a good deal, but I turned it down at this time due to the fact that we had about all the purchases from Colimo that we wanted.

Then, on October 29th, later that evening, after I had talked with Colimo out there and turned this deal down, Frank Colbert—I started out with, I started in a poker game in the back room of the Pan-American Club, in which Joe Martinez and some American fellow by the name of Jim, and two or three other people were playing, and I started playing poker there with the boys, and I had been in the game about a half hour when Art Leyvas came in. Meanwhile, Pirata had come in along with two or three others, but they had not gotten into the game, but they were standing around in the room.

(Testimony of Okla W. Johnson.)

Leyvas came up and said, "Hello fellows," and, "Hi, Johnnie," and that was all that was said at that moment, and he went directly out again, and within about a minute, Frank Colbert came in and called me and said, "Johnnie, come and buy [107] me a drink at the bar." Of course, I knew something was up, so I immediately followed him out and he told me Art Leyvas was out there and he was ready to sell me four or five cans of opium and that I should come with him right then and we could go make a deal. I went back to check out of the poker game, and Pirata came up to my chair and said, "Go ahead, check out, Johnnie, I will take your place," and urged me out of the game, and I got out of the game and went on out——

Mr. Thurman: By "Pirata," that is this defendant here?

A. Yes, sir; this defendant himself. He took my place in the game and I left the Club. We drove about a block and a half up the street where Colbert left my car and walked up about three or four car lengths and got in the car with Art Leyvas, in that car with license No., Louisiana license No. 338-799, a Chevrolet club coupe that has been previously mentioned in the testimony here. They had a conversation out there in the car and Colbert came back to me and said——

Mr. Primock: I am going to object to what Colbert said, your Honor, as heresay.

The Court: All right.

(Testimony of Okla W. Johnson.)

The Witness: I gave Colbert \$300 to buy [108] one can, and told him to tell Leyvas that I——

Mr. Primock: Object to what he told Colbert on the same grounds.

Mr. Thurman: Just tell what Colbert did.

A. I gave him \$300 to buy one can as a sample.

Q. Then what took place?

A. Then Leyvas and Colbert drove away, going north on Sixteenth Street. They were gone about 15 minutes and they came back and parked near the corner of Sixteenth and Monroe Street where I saw Leyvas in the car and Colbert got out. Colbert came over to the car and handed me a can of opium and he said, "Let's test it." I then made a test of the opium as best I could in the car by burning it, and I told him to go ahead and pay for it. He went back to the car and I saw him in a transaction with Leyvas over across the street, and Leyvas then drove away and Colbert came back to the car and handed me \$50.

Q. What about this opium you mentioned?

A. I already had possession of the opium. Colbert had handed it to me immediately when he came over before he paid for it. After I returned to my quarters I got in touch with Agent Smith and turned it over to him.

Q. Do you think you could recognize that [109] exhibit if you were to see it?

A. Yes, sir.

Q. Please examine Government's Exhibit 8 for



(Testimony of Okla W. Johnson.)

identification and see if that is opium that you received at that time and place from Colbert?

A. I know that I initialed it, but with this resealing it may be covered up. Frank Colbert initialed it at the time.

Q. What is this red stuff on here?

A. That is, no doubt, the chemist's resealing—there is some dates on there, it is 11-17-48.

Q. Do you remember where you initialed it?

A. No, sir; I don't. As a rule, I take my knife out and scratch my initials, but there are so many places here that has been covered up with opium I haven't found them yet. Lots of times I put it on the top, other times I initial them on the side, wherever seems like the best place, where I can put it.

Q. After you got the stuff you mentioned from Mr. Colbert, what did you do with it?

A. I took it home at my house and got in touch with Agent Smith and turned it over to him that night.

Q. You can find no identification mark on that?

A. No, sir; I just can't locate anything. I [110] know I placed one on there, but it is wholly covered up by opium there now.

Q. Does that have the general appearance of the can you got?

A. Yes, sir; every can I purchased was a discarded tobacco can, I mean it wasn't a can such as you often find opium in, it wasn't brass or a copper



(Testimony of Okla W. Johnson.)

can, it was a tobacco can that had all of the letters burned off. I remember that very definitely, that is what this is, and that is as far as I can go with the identification.

Q. After this transaction that you had with Colbert and Arturo Leyvas that you just mentioned, what next took place in this investigation?

A. Leyvas apparently went out of town, because we were unable to get in touch with him for several days, and on November 6th we did make contact with him and Frank Colbert told me to come to his room.

Mr. Primock: I am going to object to what Colbert said.

The Witness: Well, I went to Colbert's room in the Normandie Hotel and waited, and about 7:40 Leyvas knocked on the door and Frank went into the hallway.

Q. Which Leyvas was that?

A. Art Leyvas. [111]

Q. Arturo Leyvas?

A. Arturo Leyvas, yes, sir. Frank Colbert went out into the hall with him. They had a conversation out there and presently Frank came back in and in the presence of Leyvas said, "Have you got the money?" I said, "Yes, I have, here is a thousand dollars," and I opened my bill fold and handed Frank a thousand dollars. I said, "Go ahead and count it," which he did. While he was counting the money, Leyvas took a small piece of paper from his pocket and came over to me and got right up in my

(Testimony of Okla W. Johnson.)

face with it, and he said, "I got some heroin here I'd like to have you have. I think you can make some money with it, and here is a sample I am going to give you, I want you to try it or have somebody try it, and see if you don't want to get more of it, because I know you can make a good buy on this," and I told him I'd do just that, and he said, "Has he got all of the money?" And Frank said, "Yes, there is a thousand dollars," and he handed it back to me and Leyvas then said, "Well, Frank, you can come with me," and he and Frank left. I stayed in this room and there was about 45 minutes when Frank came into the room and had four cans of opium wrapped in newspaper and he had been in the [112] room just about a minute and we had the tape off of one can and was pulling the tape off to test it when there was a knock on the door, and Leyvas came in and he started to unwrap the others and wanted to show me what they were like, and I said, "No, I don't want those opened because the last time I had it opened it leaked out and got all over everything, and I didn't want them opened, I just wanted to test this one, and if it is all right, it will be good enough for me." The other cans, then, were not touched by me or by Colbert. They were in this paper when we received them, and this one can we had looked at, and then I paid Art Leyvas a thousand dollars right there and we had a further conversation then about the heroin and he told me that this man was going back to Mexico, that he was here with him, within a day or two, and then I ought to get in touch with him by noon the follow-

(Testimony of Okla W. Johnson.)

ing day, if I wanted an ounce of this at \$475, and he told me how good it was, and I could really make some money out of it, I ought to take it. Quite a conversation there about selling me on the idea of buying it and I told him I would let him know by noon the next day if I wanted to buy it. I then left the hotel with the opium and went to my [113] room where I got in touch with Agent Smith and turned the opium over to him and we were very careful not to touch those cans and they were later tested for fingerprints, and it had rubbed off, however, they didn't turn out, but we had the four cans tested for fingerprints, and so on.

Q. What became of this blue piece of paper that you said Arturo Leyvas——

A. Well, I put it in my pocket, of course, while he was gone, and I kept it there and did nothing with it until I got in touch with Mr. Smith, and I turned it over to him and initialed it.

Q. Turned that over to Mr. Earl Smith?

A. Yes, sir.

Q. I hand you Government's Exhibit 9 for identification and I will ask you to open the exhibit which is sealed, and tell us whether or not you can identify the exhibit.

A. There is my initials "O.W.J."—"7:45 p.m. 11-5-48."

Q. Now, is that the blue piece of paper—anybody else's initials on there?

A. Yes, sir.

Q. Whose?

(Testimony of Okla W. Johnson.)

A. I suppose this was Lorenz—Here [114] is “E.A.S.,” which is Earl Smith, and inside is the brown heroin such as comes out of Mexico.

Q. I hand you Government’s Exhibit 10 for identification, I will ask you to examine it and see if you can identify the exhibit, please.

A. This is being sealed with the tape, I have my initials on the tape, “O.W.J.” Here is “E.A.S.” for Smith on that, also there is my “O.W.J.” here and “E.A.S.” and “H.H.F.”—I think that must be some chemist’s markings. These are mine here. Here is my “O.W.J.” here and “H.H., Art. E.A.S.” That is my “O.W.J.” This is the paper they were wrapped in. It is of no significance, but it was all kept just as received.

Q. These are the four cans you got?

A. These are the four cans I received actually delivered from Frank Colbert. I paid Art Leyvas a thousand dollars for those four cans in Government money.

Q. And you turned that over to whom?

A. Mr. Earl Smith.

Q. At that time they had no stamps, revenue stamps on them?

A. No, sir, none whatsoever.

Q. And they had no permit from the Treasurer of the United States, did they? [115]

A. Beg Pardon?

Q. They didn’t have a form issued in blank for that purpose on the sale of narcotics issued by the Secretary of the Treasury of the United States?

(Testimony of Okla W. Johnson.)

A. No, sir; they did not.

Q. After the purchase of these four cans for a thousand dollars from Arturo Leyvas, what next did you do?

A. On the following morning I met Arturo Leyvas at the corner of Monroe and First Street here in the City of Phoenix. I had a conversation with him there about buying this heroin and he said, "Have you got the money?" And I told him that I did have, and he said, "Well, get in this car," and he, at that time was driving this beat-up '38 Chevrolet with License No. 55999 on it which Colimo had used on my first purchase from him. He drove me down the street one block, turned and drove a little over a block and parked at the entrance of Sears Department Store and double parked right there in the middle of the street, and meanwhile he had given me quite a talk about how I could cut this down, and he was going to furnish cutting powder as well as the heroin. He then picked up an envelope that he had somewhere [116] down beside the seat somewhere, I didn't see just where he got it, he just reached down with his left hand down low and came up with the envelope and he said, "I weighed out just the right amount of this cutting powder for you to use with this heroin so you can make some money out of it and you won't have to bother about going ahead and buying it here, and you can just cut it and go ahead and start selling it. I told him that I didn't want to go any place buying

(Testimony of Okla W. Johnson.)

that powder and I was glad he was furnishing it for me and gave him a little talk there which made him feel good about furnishing the powder, and he pulled out another envelope in which he had some heroin and which he opened up and showed me the heroin and incidentally, one of these, maybe both envelopes, was some blue paper, something similar, perhaps the same in which the sample of heroin was given to me, and he then handed me this heroin. He said it was real brown and he kept telling me to cut it and make a pretty good color and I would make some money out of it. I paid him at that time we were parked there. I put the heroin inside of my shirt pocket and we drove around about three blocks and he come back and let me out at the hotel on Third Street. [117]

Q. What is the name of that hotel?

A. Normandie.

Q. How much did you pay him?

A. I paid him \$475.

Q. What kind of a package was it in, did you say?

A. Either the mixing powder or that powder was in a blue envelope. That was just about the same as——

Q. Then what took place after that transaction with this heroin?

A. I took it immediately to my residence, got hold of Agent Smith and turned it over to him.

Q. Then what took place after you turned that



(Testimony of Okla W. Johnson.)

heroin over to Mr. Smith; what was your next activity in this case, Mr. Johnson?

A. I don't recall there was any more at that particular time.

Q. Any the next day, or whenever it was?

A. On November 7th I met Arturo Leyvas at the Avalon Bar, which was down on the main street here in Phoenix, and at that time he told both Frank Colbert and I that he was leaving for ten or twelve days, and that if I needed anything from him I'd better buy it now because he was not going to be available, and I told him that I was pretty well fixed right now, I had both mud and heroin, such as [118] we had always referred to it, and I didn't think I'd need anything. I asked him if he would not give me a phone number or something in case I needed to get hold of somebody, I could get hold of someone while he was gone, and he said, "If you need anything, Frank knows how to get in touch with Connie." He was referring to his common law wife, Connie Duarte.

Mr. Primock: I move that it be stricken, stating a conclusion of the witness.

The Court: Oh, it may stand.

Q. (By Mr. Thurman): Did you ever contact Connie Duarte?

A. Yes, we did. Frank Colbert had a couple of conversations with her and I didn't talk to her in the beginning of this transaction that we had with Connie Duarte. However, on November 14th, Frank



(Testimony of Okla W. Johnson.)

Colbert got in touch with me about 2:45 in the afternoon, and I met him at the Normandie Hotel and we sat on the steps down near the street and we sat there talking when Connie Duarte came up to us. She approached the two of us sitting there on the steps and she immediately said, "Hello, Johnnie," and said, "Art has told me about you," and Colbert had made some sort of an introduction and she just passed it off that she had been told [119] about me, and that was all that was said about that. She immediately started telling Colbert and I what a tough time she had had in trying to get hold of some heroin for me. Things didn't work out very well on her trip, and she said she had been to California and she didn't know whether she had been tailed away from here or whether her tracks had been picked up after she got to California, but they shadowed her up there and almost caught up with the fellow that she had to buy the stuff from, and he didn't permit her to bring back but just a small amount of heroin. This heroin, she said, was good white stuff and her husband had been dealing with this fellow for a long time and they were just like that (indicating by holding two fingers close together), and I could depend on it being strong, and she had brought back about half a piece and she would sell me that for \$325 if I wanted it to tide me over until the rest of it could come in, and it should come in in about two or three days. I argued with her quite a little about the price there and how I

(Testimony of Okla W. Johnson.)

was going to get it and how I was going to take care of my customers with it, and she, after that, said, "I will go up and get it right now if you need some to take care of your customers, and we can [120] have it. That is all there is." I said, "I will take it if you will tell me it is good strong stuff," and I said, "If you will guarantee me that." She said, "How do you want me to get it? Do you want to send Frank up for it?" I said I didn't care about going, Frank could go. I said, "We can go out and meet you somewhere." She said, "I don't want either one of you to come to the house now, I have a lot of company." I said, "We could wait here or go to any other place." She said, "You wait right here, I will be back in just a few minutes, possibly twenty at the very outside. She came walking up the sidewalk just as she had before and approached us while we were sitting there on the steps. In her hand she had what looked like a package, you might say, of Kleenex. She was holding it up to her nose as though she had a cold, and she came up to us in a rather loud, about a terrible cold she had, and approached us right there on the sidewalk and said, "Have you got the money ready?" I said, "Yes, I have." I pulled out my billfold, counted out the money and just folded it up and handed it to her as I sat there near the sidewalk on the steps of this hotel, and she just opened this Kleenex up and handed me the package. I picked it out of the middle. I [121] said, "Is this all of it now?" And

(Testimony of Okla W. Johnson.)

she said, "This is it. It is about a half a piece," which should be about half an ounce. She said, "I am not even going to count your money, I will take your word for it," and she just flipped with her hand, she said, "I am going to get back to my company," and she took off and I looked around the corner and saw her driving the Chevrolet with the Louisiana license as she drove away. I then got in touch with Agent Earl Smith and turned this heroin over to him that same afternoon.

Q. Going back a little, Mr. Johnson, I want to have you look at Government's Exhibit 13 marked for identification, and see if you can identify it.

A. This is the cutting powder. This has been sealed, no doubt, by the chemist in this cellophane bag here probably, to protect it from moisture. This little envelope is the one that contains the heroin, very brown.

Q. Can you identify it; where did you get it?

A. This is the one that he delivered to me, that Art Leyvas delivered to me from the old '38 Chevrolet sitting in front of Sears here in downtown Phoenix at 11:07 a.m. on the 6th of November, 1948.

Q. That is the same time you got the [122] cutting powder?

A. That is the same time I got the cutting powder. He handed them both to me. This was the regular envelope. It has been sealed here, no doubt, to keep it from leaking out, but this was the regular envelope just as this is.

(Testimony of Okla W. Johnson.)

Q. You turned that over to Earl Smith?

A. I turned it over to Earl Smith, yes.

Q. And at that time there was no Internal Revenue Stamps on them, neither did they have any forms issued by the Secretary of the Treasury?

A. None that I saw.

Q. Did they furnish you with one?

A. It would be the other way around. They would insist on getting one from me if it had been done in the legal manner.

Q. You did not furnish them one, did you?

A. I did not furnish them one, no, sir.

Q. With respect to Government's Exhibit 12 for identification, I will ask you to examine that exhibit and see if you can identify it.

A. This was later wrapped up such as it is now inside of here. I put my initials on here. It is a little difficult to get it to stay. I put it also on this paper. I received this at 3:57 p.m. on 11-14-48. There is my initials. [123]

Q. How did you receive that?

A. I received this from Connie Duarte, alias Connie Leyvas, on that afternoon in Phoenix, Arizona.

Q. You furnished them with no stamps?

A. No, sir; I furnished them with no form.

Q. And now look at the other package that was contained in the exhibit and see if you can identify it.

A. I can.

Q. All right.

(Testimony of Okla W. Johnson.)

A. This is the package that I received from Frank Colbert on the 13th of November, 1948. This is a small amount of opium wrapped up in a little bit of cellophane.

Mr. Primock: I am going to object to the witness testifying what the package contained.

Mr. Thurman: Just identify the exhibit.

A. Yes.

Q. Where did you say you got that from?

A. I got this from Frank Colbert on the afternoon of the 13th of November, 1948, and this is a small amount of powder.

Mr. Primock: We object to the witness testifying——

Mr. Thurman: Just identify the exhibit. [124]

The Court: He said it was a small amount of powder. You wouldn't need an expert to tell you the amount.

The Witness: Which I also received from Frank Colbert at the same time and the same place.

Mr. Thurman: And who did Colbert get this from, did you say?

A. I didn't say; we had not covered that.

Q. With respect to this package that you have just examined and that you say you got from Mr. Colbert, the upper left hand corner is "Ex. 13-A," what can you tell us about that?

A. I took Frank Colbert out to the vicinity of 1030 East Moreland on this afternoon, and I let him out about a block from the house.

Q. What house was that?

(Testimony of Okla W. Johnson.)

A. 1030 East Moreland, which is the house of Arturo Leyvas. He went to the house, went in, and after a time he came out and he started walking back toward the car when Alicia Duarte, the daughter of Connie Duarte, came running out of the house and called Frank back. Frank went back, went into the house again, and they apparently had another conversation, and he came back to me and handed me these two exhibits at that time. I have some further testimony there that just [125] occurred to me.

Mr. Primock: I object to him making those remarks.

Mr. Thurman: What remarks?

The Court: Yes.

The Witness: It is relative to this.

Mr. Primock: Let counsel ask you the questions.

Mr. Thurman: I will ask you the questions. Do you have any further evidence you would like to tell the Court and jury concerning that exhibit, Mr. Johnson?

A. At the time Connie Duarte delivered to me \$325 worth of heroin, Colbert and I were both in conversation with her and Frank said, "It was mighty nice of you to leave that stuff with your daughter Alicia so I could get fixed up while you were gone, and that was just enough to take care of the need I had for it at that time." She said, "That is all I have, but I told her to give it to you if you came out, that you might need it."



(Testimony of Okla W. Johnson.)

Q. (By Mr. Thurman): After that particular transaction that you just mentioned, what next did you do in the investigation of this case, Mr. Johnson?

A. On the afternoon of November 17th, Frank Colbert telephoned — dialed the telephone 96327 and he had held a conversation. [126]

Q. What was that phone number?

A. 9-6327. He called then in my presence. I saw him dial it, and that, incidentally, is the——

Mr. Primock: Just a moment, I object to telling incidentally what anything is.

A. That is a restricted number of Arturo Leyvas at 1030——

Mr. Primock: I move that it be stricken, not the best evidence, and I also wish the Court would admonish this witness to testify only to——

The Court: Did you try to find the number in the directory? A. Yes.

Q. You could not find it? A. No, sir.

The Court: All right.

Mr. Thurman: You say Mr. Colbert dialed No. 9-6327? A. Yes, sir.

Q. All right, then what happened?

A. I received another call a little later from Colbert. I was down town waiting, expecting a call from Connie, which I didn't get. Colbert called me. I went to his room in the hotel, and about 8:30, Connie knocked on the door and Colbert let her in. Connie said Art was in bed with a [127] bad knee and he had been out on a trip and had



(Testimony of Okla W. Johnson.)

got a lot of trouble with his knee and he couldn't come down town at all to make any kind of a deal," and Colbert said in her presence and in my presence that she had told him that the heroin would be \$625 an ounce, and I held quite a conversation with her at that time about the price of it and whether or not I could make any money on it, and I had lost money on the brown heroin that I had bought because nobody liked it. In other words, I tried to get a lower price for this heroin, for \$625 an ounce. She said she couldn't make any kind of a deal at all and if I wanted to do anything about it I would have to talk to Art. I said, "Well, I am willing. Can he meet me somewhere, or what can be done?" She said, "I don't see anything wrong in taking you out to the house. If you want to go down, it is all right with me." I said, "It is perfectly all right with me, I will go," so we went out, got in her car, and another thing that happened here, before we went out there, Connie had told me that she had seen Earl Smith across the street in a cafe, and at that time I said, "Well, Connie, I am not going to have anything to do with this at all if he is around. I know the heat is on, and if he is [128] following you, I am not going to make any kind of a deal at all," and she started talking quite a bit more then and quite a lot faster, and she said, "Well, now, he isn't following me around, I don't think that he knows me, by face only when he sees me. I don't think he was following me. He just happened to

(Testimony of Okla W. Johnson.)

be in there having a sandwich, I have no doubt it is just an accident," and I let her convince me it was perfectly all right, and then I let her take me up there to the house at 1030 East Moreland. She drove in a circuitous route among the streets, and she told me she didn't know where it was but that she was willing to take me there. Of course, I knew where it was but I paid no attention to the streets. We arrived there and found Art Leyvas in the front bedroom with a lot of pillows under his knee and I went and sat down in a chair beside the bed, and I had a conversation for quite some time, and he told me that his knee had been broken while he was in the penitentiary and that he had had wires put in it, and every now and then, periodically, it gave him quite a lot of trouble, especially when he was out and had a lot of exposure, and he said he had been down in Mexico and the floods had been pretty bad down there, and they had been having quite a [129] time getting the stuff out, and that is why his knee was so bad trying to go through the hardships trying to get narcotics. I told him I felt like \$625 was a quite a little in view of the fact that I had not come out so well on the other deal, and he told me that he would give me a little extra to make up for that if I would go ahead and take an ounce, and I then told him I would, and he called Connie. He said, "Connie, fix up a piece for Johnnie," so I heard her then rattling around in the kitchen and then she came into the room, a large round

(Testimony of Okla W. Johnson.)

table they had in their living room, sort of a coffee table, and she put an envelope on there that had quite a bit of powder in it and she took a nail file and started dipping this powder out and then putting it into another envelope. She fixed up what she said was a piece, and came in and handed it to me. I looked at it and asked her if that was a full piece and she said there was a little extra there, that she had put in some more because that is what Art had told her to do. We had a little more conversation there about opium and Art told me that because they had had so much trouble getting it, he was going to have to get \$275 a can if I only bought one or two cans, but if I bought a five can deal, [130] he would still make it for \$250. He did make this statement: He said, "You know, I brought that back from Culican, Mexico." He said, "I didn't make but \$50 on each piece because it is so high." Just before I left, Art said, "Are you going to see Frank Colbert?" I said, "I expect I will. I haven't seen him in a couple of days and I do expect to see him." He said, "I had Connie fix up a couple of shots for Frank," and she placed some more heroin in a cellophane bag and handed it to me just like she handed the other, and I then paid Art the money as he lay there in bed. I counted out \$625 in Government funds and gave it to him. After leaving, I got in touch with Agent Earl Smith and turned the evidence over to him.

Q. Handing you Government's Exhibit 14

(Testimony of Okla W. Johnson.)

marked for identification, I will ask you to examine the exhibit and see if you can identify it.

A. There is my "O.W.J." right there.

Q. You can identify it?

A. Dated 11-17-48, and I also have the paper that she wrapped it in, dated, and my initials appear on it also.

Q. Just which bag is that that she gave you?

A. That is the one I paid \$625 for. The small one also has my initials on it, and this is the [131] one that Connie gave me at Art's direction. It was supposed to be for Frank Colbert, and there is my initials on that.

Q. Those are the two exhibits you mentioned in your testimony?      A. Yes, sir.

Q. And did you have one of those forms issued by the Secretary of the Treasury to make a purchase of that?      A. No, sir.

Q. Any Internal Revenue Stamps on there?

A. There were no stamps whatsoever.

Q. After receiving the two exhibits you have just identified, what next did you do in your investigation of this case with respect to the defendants mentioned therein?

A. The next thing that happened was quite some time later. We had had considerable trouble with meeting some of these people. They seemed to be out of town quite a bit. On the night of January 12th I learned that the defendant Arnold Enriquez, or Arnold Pirata, as I knew him during that time,

(Testimony of Okla W. Johnson.)

was going to the fights at Madison Square Garden, and we were trying to get in touch with him, but not having had any luck getting hold of Art in the last few days, I went to the fight and took [132] Frank Colbert with me and we saw the fights, and managed to see Arnold there, and managed to let him see us there, and after the fight, Frank Colbert—during the fight had gotten to him and told him he wanted to talk to him after the fights, and they met on the outside practically clear of the crowds just gathering there, and they walked behind an automobile that was parked near the curb there where they held a conversation. I didn't hear any of that conversation. On the following day, which was January 13th, I went to Pirata's Club, which it was called at that time, having been changed over from the Pan-American Club meanwhile, where I had a conversation with Charlie Pacheco, and I asked Charlie Pacheco if he would call Arnold for me.

Q. That is Arnold Enriquez?

A. Arnold Enriquez, Arnold Pirata, as I called him, Pirata. I asked Charlie Pacheco if he would telephone Arnold Pirata and see if he would come down to the Club, I wanted to talk to him. Charlie Pacheco did call and he came back about a—

Mr. Primock: I am going to object to what Charlie Pacheco said, it is hearsay.

Q. (By Mr. Thurman): Just tell what happened after Pacheco made this call. [133]

(Testimony of Okla W. Johnson.)

A. This was about two o'clock, or somewhere in that vicinity. I stayed at the Club waiting, and in about 4:15 Arnold Pirata and Joe Martinez came into the Club. Arnold sat down beside me and said, "Hi, Johnnie," and sat on the stool, and Joe Martinez said, "I am going to get a sandwich," and he went over, I suppose, to a restaurant there. I just saw him go out of the Club. Pacheco and the defendant Pirata and I sat there for a few minutes. We had a beer, we ate a couple of hard boiled eggs, and during that time we had a conversation about the sign that Pacheco was getting from Pirata to put it up in front, and how much it was costing to hang it, and just things in general were discussed while Charlie Pacheco was there. Charlie Pacheco went on up to the front and started waiting on other customers and we started up, and I started talking with Arnold. I told him I had talked to some customers by long distance and I needed to get hold of some stuff right away, and I had not been able to get hold of Art Leyvas at all, I didn't know what I was going to do if I couldn't get hold of something. He said to me——

Mr. Primock: Who said?

A. The defendant Pirata said, "There isn't [134] anything in town, and you will not be able to get anything until Art gets back." He said, "I'd like to help you, but there isn't anything I can do until the stuff gets here." I then said to Arnold, "Will it be possible to get a fun—100 fun jar to get to



(Testimony of Okla W. Johnson.)

my customer before that time so I can get it to him right away," and Arnold then said, "Have you called Connie?" I said, "I don't know her number," and he said, "Doesn't Frank know it?" I said, "Yes, Frank knows it, but he won't tell me, and I think he is giving me the run-around the same as Art, because I have not been able to get in touch with either one of them," and he said, "Well, do you know Connie?" I said, "Yes, I know her, she has had me out at the house," and he immediately said something to Joe Martinez, who had come back in the Club, in Spanish, and Joe Martinez said, "Johnnie, how about a game of shuffleboard," and Pirata then left the Club. We played two games of shuffleboard, Joe Martinez and I, and just as we were finished with the second game, Pirata came back in and he said, "Johnnie," he said, "I know that Art is going to be back tomorrow night. If you will be here between 5:00 and 5:30, I will see to it that Art meets you right here." I said, "I'll be here," and he said, [135] "Come on, Joe," and he left. So, on the following day, which was January 14th, I went to the Club at 5:00 o'clock, and when I got there I found that Colimo was there.

Q. That Jerez again?

A. Jerez. Colimo was there. We talked a few minutes, played with some of the machines, and Colimo said, "Come on, go with me." I said, "I can't go any place right now, I am waiting



(Testimony of Okla W. Johnson.)

for somebody.” He said, “Are you waiting for Art?” I said, “Yes, I am.” He said, “Well, Art is tied up and Arnold told me to come down.” I said, “Well, that may be so, but Arnold told me to be right here and Art would meet me, and that is what I am going to do,” and Colimo then said, “Why haven’t you talked to me, or why haven’t you done any of this dealing with me?” And, we had quite a long conversation there about why I had quit dealing with him, and I told him that I just didn’t care to deal with him any more, the crook, so I said, “I had been dealing with Art, and that is who I was going to talk to, and that is all there was to it. Well, he said, “Well, I will send Art over, then,” so he left the Club then and about 5:35 Art Leyvas came into Pirata’s Club and we went up to the bar, had a drink, and he asked me to come [136] across the room, and we sat at the table across the room where we had a talk, and I asked Art considerable about some heroin that we had been talking about, and he told me that he thought he was going to get some that he could sell for less than \$500, and I had told him I was interested, however, he told me it would be 30 or 40 days before he was going to be able to get any because of the flood in Mexico, and they just couldn’t get that kind of stuff out, and they have to go too far to get it, and there was too much trouble down there because of the flood, and then Leyvas said, “So Colimo said you didn’t want to

(Testimony of Okla W. Johnson.)

talk to him," and I told him why I didn't want to because he had tried to gyp us and that I had not been satisfied with dealing with him, I had been dealing with Art, and we wanted to continue dealing with him." I said, "That is the reason I got in touch with Arnold, I didn't want to get in touch with these other boys, I didn't want to deal with them any more." He said, "Arnold told me to contact you, but I was busy, and Colimo came down and he started to tell you and Frank Colbert you should not have got mad at him," and Leyvas told me that the mud was pretty hard to get at the time, the opium, [137] that because of the flood, and that he could supply anything up to eight or ten cans right now and that would be all that could be supplied at that time, and I told him that I could get along with three cans if it was going to run him short, and he said, "Well, it is going to cost you more because I will have to get more than \$250 unless you want to buy four cans." I told him then I'd take the four cans, and he started then telling me how much better the stuff was and that I would really have better results from this than I had before. He said, "I am going to be tied up a little bit, I am going to send Colimo down." He said, "Colimo is a good boy, but he takes some handling, and I can handle him. He will be here to meet you at 10:00 o'clock." I told him I hated to wait so long, I'd like to get it a little quicker. He said, "Be here at 9:00, and by 9:00

(Testimony of Okla W. Johnson.)

o'clock we can make a deal," and I left the Club at that time, and at 9:00 o'clock I arrived at the Pirata Club and waited, and at about 9:23, Colimo came in, approached me at the bar. I offered to buy him a drink. He declined. I said, "Am I to follow you?" He said, "I will go with you," and we walked out of the Club and got in a Government car, and he [138] directed me how to drive. He said, "Drive straight north on Sixteenth," and we drove for four or five blocks, and he said, "Turn right," and during this ride, well, he kept looking out of the windows and seeing if we were followed, and so on, and he directed me to drive about four or five more blocks, and I — It wasn't that far, because we went up on Nineteenth, it was three blocks, and we turned right on Nineteenth Street and went down across Washington and went two or three blocks there. It was pretty dark, I didn't want to appear too obvious and see where we were going, but when we turned and started going east again and in about the middle of this block I saw a tree there, rather a small tree, and in front of it I saw a man that I had picked up with my headlights, and upon arriving near there, Art said, "Pull over by that tree" — Colimo said that, and Art Leyvas was standing there under the tree. Colimo opened the door and Art reached right down beside the tree and picked up a package wrapped in paper and got into the car. We had a little conversation there and he started taking the wrapper off and

(Testimony of Okla W. Johnson.)

opening—We opened all of the cans. He got a flashlight out, and Colimo had a little trouble getting it on, and he cussed him [139] out, told him he couldn't do anything. He grabbed the flashlight away from him and flashed it on and showed me the opening—He called my attention to it and told me it was filled to about three-quarters of an inch from the top. He said, "We keep this in the dirt when it is cool and there is enough room for expansion, and it won't run over the top." He gave me a selling point for not filling them full. As we talked, a car made a turn, came toward me with the headlights toward us, and I started to get the opium down, I was afraid somebody might be checking on us, and Colimo said, "You don't need to be afraid in this section," he said, "All of these people up here are on the alert and no law can start coming around, they just start whistling, and the deal would be perfectly all right." He said, "That happens to be my brother-in-law, and he happens to be making trips down here while we are making this deal." That car passed us twice while we were sitting there talking.

After I examined the opium, I had a thousand dollars in my other pocket, I had ten \$100 bills which I handed to Art Leyvas, and he started to count it, and he had the flashlight, so he just handed it over to Colimo, and he said, "You count [140] it," and Colimo counted it, and Art Leyvas said, "Say, there is something else I want to talk to you about."

(Testimony of Okla W. Johnson.)

I had talked to him previously about some New York connections I had. He said, "I wish you would get in touch with your New York connections and see if you can get some hot money." He said, "We could take that queer money into Mexico and buy a lot of opium with it," and he said, "I will split the profits with you and we will make some money on it." I told him I would see what I could do and talked to him there about five minutes along that line, and as I started to pull away, they got out of the car, of course, and I saw the Chevrolet with the Louisiana license parked up in the driveway of this place. I then went away. Colimo admonished me just before I left that I need not be afraid while I was in this section, but to be very careful when I got out across Washington and Van Buren. I went up to my residence and got in touch with Agent Smith and turned the opium over to him.

Q. I hand you Government's Exhibit 18 for identification and ask you to open it and examine the contents and see if you can identify it. How many cans did you say you purchased at that time? A. Four. [141]

Q. Can you identify those as being the cans that you received at that time?

A. Yes, sir. That one has my initials on it.

Q. That is all right, you can identify them for him again also on cross-examination.

A. This one has it, this one has it, yes, sir.

(Testimony of Okla W. Johnson.)

Q. And you turned these over to Earl Smith?

A. Yes, sir.

Q. They are practically in the same condition now as they were at the time you turned them over to Earl Smith?

A. They are, yes, sir.

Q. Except the leakage?

A. Yes, sir.

Q. And you furnished to them no Treasury permit to purchase it?

A. No, sir.

Q. And it had no Internal Revenue Stamps on it?

A. No, sir.

Q. Cancelled or otherwise?

A. No, sir.

Q. Now, can you tell us the next time you entered into the picture of this investigation?

A. Yes, sir.

Q. About when was it?

A. It was on the afternoon of January 29th, 1949. [142]

Q. What did you do at that time with respect to the investigation?

A. I was at the Pirata Club.

Q. Now, this was in January 29, 1949, this Pan-American Club, what was it named at that time?

A. That was Pirata's Club, or Pirata's Inn, I believe was the name that was on the outside. I don't know how it was registered, but it had an electrical sign outside, a neon sign on it "Pirata's Inn."

Q. Did you know the owner and operator of Pirata's Inn at that time?

A. Yes, sir.

Q. And who was it?



(Testimony of Okla W. Johnson.)

A. The owner was the defendant, Arnold Enriquez.

Q. All right. Now, on that date what took place at this particular place?

A. I had a conversation with Charlie Pacheco who was manager of that Club. I told him I had not been able to see any of the boys around, I couldn't find Arnold or Art or Colimo, and I wanted him to get in touch with somebody and asked him if he knew where I could call some of them, or how I could get in touch with them, and he called his son, young Nacho, and asked him to call [143] the house of Art Leyvas.

Mr. Primock: I object to that as hearsay, your Honor.

The Court: Yes, that is probably so.

Mr. Thurman: I know it is difficult, Mr. Johnson, but just, when they are not in the case, that is, the defendants, why——

A. Well, anyway, pretty soon Nacho called me to the telephone and said, "Joe wants to talk to you." Anyway, I went to the telephone, and he said, "This is Joe Martinez."

Q. Did you recognize his voice?

A. No, I didn't recognize his voice. He said that, and I said——

Mr. Primock: I am going to object to any further testimony as to what happened on the telephone, as long as the witness says he could not recognize the voice as being that of Joe Martinez, on the ground that it is hearsay.



(Testimony of Okla W. Johnson.)

The Court: Well, that may have been verified later. Go ahead.

A. In about 30 minutes Joe Martinez came to Pirata's Club, and he came over and sat down at the table where I was sitting, and we had a conversation, and he said, "What is the matter, Man?" I told him, I said, "Well, I am just out of [144] stuff. I am trying to get hold of some in the City, I can't get it." I said, "I thought I'd call you and see what you can tell me," and he said, "Don't you know all of those fellows are in jail in California?" I said, "I found it out, I hadn't known about it before." He said, "You should not call the house at this time, they probably have the phone tapped out there." I said, "I didn't know that before, I couldn't help it, because we had called Connie so many times, and he said, "Well, that's the way it is." I said, "Well, I need to get hold of something right away, I need it bad, and I want—I am going to lose my customers if I have to put up with all of this being pushed around and not being able to get as much as I wanted, however, I'd like to buy short, in other words, a small quantity, until I can get hold of these fellows, get back into town. He said he didn't have any short stuff at all, but he did know about some cans that were in town, he believed he could do something about it. He said it was pretty high. I said, "How much is it?" And he said, \$350 a can." I told him, "That is too much for me." I pulled out my billfold and I had \$270 in

(Testimony of Okla W. Johnson.)

my billfold. I said, "That is all I've got, I can't do anything better than that," and he said, "Well, I've got \$130 here that I will put it in with you and you can pay me back later if you want to get a can." I told him I wouldn't do that, it was just too much money, I was not going to pay that kind of money for it, and he said, "Wait a minute," and he went over to the telephone. I didn't hear what was said, but he came back to me in just a minute and he said, "Say, I misunderstood that fellow." He said, "The price is \$250 a can." I said, "Well, that's just fine, I am fixed up just right. I will take it," and he said, "Where do you want the package at?" I said, "It doesn't make any difference to me." He said, "I will have to go get it." He said, "It would just take me a few minutes." I said, "Well, as long as you are going after it, you might as well take the money with you, and I paid him \$250 in the restroom of Pirata's Club, which was about 6:25 I had arrived, and it was just a few minutes later that he left the Club, and as he left, he said, "I will go get the can, I will bring it back and put it in your car, and I will come in and tell you about it." I said, "I don't care much about dealing around the Club anyway, it is a little hot." I said, "Suppose I drive off some place [146] and you can meet me. You tell me where to go." He said, "Go out 24th Street and wait—Go out to Van Buren and wait just on the other side of 24th Street," which I did. I drove out there in a Government car, parked, and in about 15 minutes he

(Testimony of Okla W. Johnson.)

came to the car, opened the right hand door, got in, sat down beside me and handed me the can of opium. He stated that he just had gotten a wire at the house from Arnold, and that Arnold said to get his ass out there to California and get them a new lawyer, and then he left the car and said he had to get going right now, and that is the last I saw of him.

Q. What did you do with that exhibit?

A. I turned it over to Mr. Smith.

The Court: Well, we will suspend here until 10:00 o'clock in the morning. Keep in mind the Court's admonition.

(Thereupon a recess was had at 4:35 o'clock, p.m.) [147]

10:00 o'clock a.m., April 27, 1950.

All parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: Call your next witness.

Mr. Thurman: Mr. Johnson was on the stand, I believe, your Honor.

The Court: All right, come forward.

OKLA W. JOHNSON,  
resumed the witness stand and testified further as follows:

Mr. Thurman: Please read the last question?

(Thereupon the last question and answer was read by the reporter).

(Testimony of Okla W. Johnson.)

Direct Examination

(Resumed)

By Mr. Thurman:

Q. I hand you Government's Exhibit No. 20 for identification and I will ask you to examine it, Mr. Johnson, and see whether or not you can identify the exhibit.

A. Yes, sir. That is my initials, O. W. J. 1-29-49.

Q. And that is the can that you received from who on that date?

A. Joe Martinez, here in the City of Phoenix.

Q. And it was turned over to Mr. Smith? [148]

A. That is right.

Q. Any stamps on it; did you have one of those forms issued by the Secretary of the Treasury for the purchase of that?

A. No, sir, I did not.

Q. Did you participate any further in this investigation, Mr. Johnson?

A. Yes, sir.

Q. And in what way?

A. Well, I had another conversation or two before the arrests were made with the defendants.

Q. With this defendant here?

A. Not with this defendant. I had a conversation with Colimo—Arturo Jerez.

Q. Where did that conversation take place?

A. At the Pirata Club at Sixteenth and Washington.

Q. About what date?

(Testimony of Okla W. Johnson.)

A. It was on February 3d, 1949.

Q. And who was there at that time?

A. Just Colimo and I were talking there. There were others in the bar, but we were separated from other people.

Q. What time of day was it?

A. I just say in the afternoon. I don't have any special time noted. I know it was fairly [149] early, probably 2:00 or 2:30 in the afternoon.

Q. What did you say to him and what did he say to you in substance, with respect to this case?

A. We were sitting at one end of the bar having a beer and talking, and I said, "I hear you fellows had a lot of trouble up on California." He said, "Yes, we sure did." He said, "We made bail out there."

Mr. Primock: I am going to move that that be stricken as immaterial and object to further questioning along that line, your Honor.

The Court: Well, I think that part of it is, what happened to them in Calfiornia. There might be other parts that might be material. They might have been acquitted in California.

Mr. Thurman: It is not particularly about the arrest, that is simply an item that——

The Court: Well, I know, but that item probably the jury should not hear.

Mr. Thurman: Withdraw the question. You may cross-examine.

(Testimony of Okla W. Johnson.)

Cross-Examination

By Mr. Primock:

Q. Is Okla W. Johnson your correct name?

A. Yes, sir.

Q. And what names were you going under when you were dealing with these defendants?

A. I used my true name, only I was called "Johnnie" about all of the time.

Q. Did you tell them your name was Okla Johnson?

A. Well, this membership card I got out of the Club was made out: "Okee Johnson." That is the way they spelled it.

Q. Were you introduced to them—Were you introduced to them as Okla Johnson or Johnnie Johnson, or how were you introduced to them?

A. They asked me my name for that membership card. I said, "Okla Johnson."

Q. Just a minute, please. You said earlier that somebody named Joe Araga introduced you to these people?

A. Yes.

Q. What name were you introduced to these people under, Okee Johnson, Okla Johnson, or Johnnie Johnson?

A. I think he said, "This is Johnnie," because there was no formal introduction, it was just a matter of meeting with these people. I don't believe the full names were actually brought [151] out at that time.

(Testimony of Okla W. Johnson.)

Q. Of course, these defendants didn't know you were a narcotic agent, did they? A. No, sir.

Q. Now, the first sale that you, or the first dealings you had with them, you said, was October 3d, '48? A. No, I don't believe I did.

Q. When was the first sale?

A. The 26th of September, 1948.

Q. The 26th of September?

A. I believe that is correct.

Q. You purchased then, you say, some marijuana cigarettes? A. That is correct.

Q. What did you do with those cigarettes?

A. I turned those in.

Q. You turned those in to who?

A. To Mr. Smith, yes, sir.

Q. Now, Mr. Johnson, where did you get the money that was used to purchase all of these narcotics?

A. It was supplied by the Government.

Q. And how much money did you expend on this particular case?

A. I don't know, I haven't added it up. [152]

Q. Well, approximately how much money would you say?

A. I suppose I spent about \$5000 myself.

Q. And where would you get this money?

A. From the Bureau of Narcotics.

Q. From whom? A. From Mr. Smith.

Q. From Mr. Smith? A. Yes, sir.

Q. Mr. Smith authorized the expenditure of all this money? A. Yes, sir.



(Testimony of Okla W. Johnson.)

Q. And that was Government money?

A. It was Government money, yes, sir.

Q. Now, when you purchased on September 26th, 1948, when you went outside and purchased the cigarettes from Colimo, was Arnold Enriquez present?

A. He was inside of the Club, yes, sir.

Q. He was not outside where the purchase was made, was he? A. No.

Q. Now, on October 3d when you made your purchase from Colimo on the railroad tracks at Third Street, Arnold Enriquez was not present, was he? A. No, sir. [153]

Q. Now, on October 29th, when you made the purchase from Colimo in which you gave him \$300, I believe, Arnold Enriquez was not present, was he?

A. I don't think I ever gave Colimo \$300. What is the date?

Q. October 29th.

A. No, that was Arturo Leyvas.

Q. Arutro Leyvas? A. Yes, sir.

Q. All right. Arnold Enriquez was not present when that transaction took place, was he?

A. Not out there in the street, he was in the Club.

Q. He was not in your presence when that sale was made, was he? A. No, sir.

Q. Now, on November 6th, when you went to Colbert's room and you gave Frank Colbert a thousand dollars and Leyvas gave you some small

(Testimony of Okla W. Johnson.)

paper of heroin as a sample, and also gave you four cans, Arnold Enriquez, this defendant, was not present, was he? A. No.

Q. By the way, on that particular date those four cans you indicated that they were, the initials "H. H." and "W. C." alongside of yours when you indentified it. Whose initials was "H. H."?

A. I don't know.

Q. Whose initials are "W. C."?

A. I don't think it is "W. C." "F. C." would be Frank Colbert, and that is probably what is was.

Q. But you don't know anybody by the initials "W. C."? A. No, I don't think so.

Q. Now, on November 7th you met Arturo Leyvas on First Street and Monroe, and on that same day you gave him \$475 for some heroin. Arnold Enriquez, this defendant, was not present, was he?

A. No, sir.

Q. On November 14th, when you made your purchase on the steps of the Normandie Hotel from Connie Leyvas, this defendant Arnold Enriquez was not present, was he? A. No, sir.

Q. At the time when you went out to the house of Arturo Leyvas, when you talked about he had a bad knee and you gave him \$625, this defendant Arnold Enriquez was not present, was he?

A. No, sir.

Q. On January 14th, 1949, when you and Colimo met Arturo Leyvas under a tree and you gave him a thousand dollars for four cans, Arnold Enriquez, this defendant, was not present, was he?

(Testimony of Okla W. Johnson.)

A. No, sir.

Q. On January 29th, 1949, when you went into Pirata's Inn and Martinez came into the Club and you made a purchase from Joe Martinez, this defendant Arnold Enriquez was not present, was he?

A. No, sir.

Q. Now, who is Frank Colbert, is he a Government agent?

A. No, sir.

Q. Is he what you call an informer?

A. Yes, sir.

Q. Do you know whether or not he got paid for working on this case?

A. Yes, sir.

Q. And do you know how much he got paid for working on this case?

A. I don't know directly, no, sir.

Q. You didn't pay him personally?

A. I didn't pay him, no, sir.

Q. But you do know he got paid something?

A. I understood that he did, yes, sir.

Q. Now, Mr. Johnson, you first worked on Art Jerez, or Colimo, as he is known, you worked on him until you made a purchase from him, is that correct?

A. Yes, sir. [156]

Q. And then I believe you stated when you had enough purchases on him, from him, you then turned down any further purchases from him?

A. That is correct.

Q. Then you went to work on Arturo Leyvas, did you not?

A. Yes, sir.

Q. And you worked on him until you had made

(Testimony of Okla W. Johnson.)

enough purchases from him and then you quit him, is that correct?

A. No, I never did quit him, I dealt with him from then on.

Q. And from him you just transferred your affections to Connie Duarte and worked on her until you had several sales with her, is that correct?

A. I made some sales, I was not transferring any affections.

Q. But you did make some purchases?

A. That is correct.

Q. And after you had Connie Duarte, you transferred your labor, we will say, to Joe Martinez until you had made some sales from Joe Martinez?

A. I did.

Q. Then you went to work on this defendant Arnold Enriquez, didn't you?      A. Yes. [157]

Q. But you could not make any sales or purchases from him, could you?

A. I didn't make any, no, sir.

Q. You tried, did you?

A. Yes, sir.

Q. You sent other people to this defendant Arnold Enriquez, to make purchases, didn't you?

A. No, I did not.

Q. Didn't you send Frank Colbert to Arnold Enriquez?

A. That was for me to make purchases, it was not for him to make it.

(Testimony of Okla W. Johnson.)

Q. Yes, but you sent other people, didn't you?

A. Only Frank Colbert.

Q. And didn't he tell Frank Colbert that he was not dealing with this kind of stuff?

A. Not to my knowledg, he didn't.

Q. Didn't Frank Colbert tell you that?

A. No, sir; Frank Colbert told me there wouldn't be anything until Friday after that conversation with Arnold Enriquez.

Q. You recall, do you not, testifying in the preliminary hearing on March 28th, 1949, in Phoenix, Arizona? A. Yes, sir.

Q. And didn't you, in answer to this question by counsel for the defendant, you gave this answer: "Q. This Frank Colbert, did you send him to him? A. Yes, sir." Did that take place?

A. I expect it did.

Q. "Q. You did, and Mr. Frank Colbert reported to you just what you have testified to, that the man said he was not engaged in the business at all? A. That was on one occasion on the night of January the 12th as the prize fights—Q. Yes. A. —and I told him to go over and ask Pirata if we could buy anything that night. That was the only occasion. Q. You were not successful in obtaining anything— A. No. Q. On that occasion? A. No. That is true." Now, did that take place?

A. Yes, I believe it did.

Q. I will ask you if at the same hearing these questions and answers didn't take place: "Q. Was

(Testimony of Okla W. Johnson.)

that the first time that you had ever met Mr. Enriquez? A. No, sir."

A. What date was that again, there?

Q. The 13th day of January, 1949.

A. Yes, sir.

Q. "Q. You had met him on other occasions?

A. I had. Q. But you had not approached him concerning any narcotic transactions? A. That is right. Q. Had anybody in your presence prior to that time [159] approached him concerning any narcotic transaction? A. Yes, sir. Q. And on those occasions he informed the party in your presence that he did not have any of that kind of stuff, wasn't dealing in it? Isn't that a fact? A. Well, I didn't hear all the conversation, but I gather that is what was said at that time."

Mr. Thurman: Just a minute. I naturally supposed he was trying to impeach this witness, but there is no foudation laid for this particular cross-examination, the proper foundation has not been laid, so I object to any further.

The Court: Yes. I don't see it. The objection is sustained.

Q. (By Mr. Primock): Now, Mr. Johnson, you stated that on January 29th, 1949, Arnold Enriquez was the owner of Pirata's Club.

A. As far as I knew, yes, sir.

Q. Now, isn't it a fact that Nacho Pacheco was the owner under a beer license at that time and place at that club?



(Testimony of Okla W. Johnson.)

A. I didn't check his license. I don't know. I knew he managed the place, and I had conversations with him about Arnold coming down and fixing the heater and fixing this and that, because it was his building. Now, that is all I know about it.

Q. Then you don't know, and when you said under direct examination that Arnold Enriquez was the owner of the bar, you were just guessing, weren't you?

A. No, sir, that was my understanding.

Q. It was your understanding?

A. Yes, sir.

Q. And you won't definitely state under oath at this time that Arnold Enriquez was the owner of that property at all?

Mr. Thurman: I object to that as immaterial.

A. As far as I know, he is.

The Court: Wait a minute. It is argumentative.

Mr. Primock: That is all.

Mr. Thurman: That is all.

(The witness was excused).

Mr. Thurman: I may have to recall this witness. That is all for the present. Mr. Sandoval.



## MIKE SANDOVAL

was called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

## Direct Examination

By Mr. Thurman:

Q. Please state your name?

A. Mike Sandoval. [161]

Q. And where do you live, Mike?

A. Well, I live in El Paso.

Q. During the year '48, where were you living?

A. What year?

Q. '48. A. '48? In Tucson.

Q. Tucson, Arizona, and during the year '48 did you have occasion to come to Phoenix, Arizona.

A. I remember I came in Christmas, I don't know whether it was '48 or not.

Q. Do you know Arturo C. Leyvas?

A. Yes.

Q. Do you know Arnold Enriquez, this defendant? A. Yes.

Q. And you know Ray C. Leyvas? A. Yes.

Q. And you knew Connie Duarte? A. Yes.

Q. Arturo Jerez—Jerez. How do you pronounce that?

A. I know Arturo Jerez, I knew him by "Colimo."

Q. You knew him by "Colimo"? A. Yes.

Q. You know Joe Martinez? A. Yes.

Q. Do you know where Arturo C. Leyvas was living [162] during the latter part of the year '48?

(Testimony of Mike Sandoval.)

A. He lived on East Moreland Street, here in Phoenix.

Q. Were you ever there during that year at the home of Arturo C. Leyvas? A. I was there.

Q. About when did you arrive there?

A. I came here from Tucson on Christmas Day.

Q. Huh? A. On Christmas Day.

Q. On Christmas Day? A. That is right.

Q. Who was there on Christmas Day when you got to the home of Arturo C. Leyvas, do you remember? A. Well, I didn't come to his home.

Q. You didn't? A. No.

Q. Did you ever come to his home during that year?

A. No. On Christmas Day I went to a party at Ray Leyvas' house and there I met Arturo, his brother, and he told me, "What I was doing." I told him I just quit a job at the University and I came here. He asked what I was going to do. I said, "Well, I plan to look for a job here," and he said, "Where are you living?" I said, "Well, I am [163] going to look for a hotel." He said, "Well, come down to my house, you can stay there."

Q. Did you go to his house?

A. Next day I went to his house.

Q. About when was that, Mr. Sandoval?

A. Well, 26th, I think.

Q. About the 26th of December, '48?

A. December, '48.

Q. And then how long did you stay there?

(Testimony of Mike Sandoval.)

A. Well, I stay there altogether must be about 11 or 12 days off and on.

Q. Off and on? A. Yes, sir.

Q. And did you stay there during the year '49?

A. '49, yes.

Q. And during the time that you were at the Leyvas home here in Phoenix, Arizona, did you see the defendant Arnold Enriquez there?

A. I saw Arnold Enriquez about, I would say, three or four times.

Q. And what did you do—Who was there when you saw Arnold Enriquez there?

A. You mean at Arthur's house?

Q. Yes.

A. I didn't see him at Arthur's house. I saw him at Pirata's place, I used to go down drinking there. [164]

Q. Did you ever see Arnold Enriquez at Arturo Leyvas' house? A. Yes, I saw him there.

Q. When?

A. Well, it was before I went to San Diego.

Q. How long before you went to San Diego?

A. I don't remember the date, but I know that one night they decided was going to the fights in Los Angeles. We went on the 25th, I think.

Q. How long before the 25th of January, 1949, did you see Arnold Enriquez at Leyvas' house, at Arturo Leyvas' house?

A. Before I went to San Diego?

Q. Yes. A. About three or four days.

(Testimony of Mike Sandoval.)

Q. And what did they say at that time; just who was there; who was there at that time?

A. Arnold and two Leyvas, Colimo, and Joe Martinez and I.

Q. And did Arnold Enriquez come in that day?

A. Yes.

Q. And what did they do that day at the house there?

A. You mean what they were doing before he came?

Q. Yes. As far as you know, tell us what they were doing.

A. Well, Arturo and Connie and Colimo and Martinez, they were smoking opium there, must have been about eight, I guess, something like that, then when Arnold come in the house——

Q. Who? A. Arnold.

Q. Arnold came in the house?

A. Yes, that is right.

Q. Then what happened?

A. Then he just said, "Hello." I said, "Hello." And just went back to the room.

Q. Who went back to the room?

A. I did, I lived at the back room, back front room and bath room, and another room, and I live in the back room.

Q. You went back in the back room, then?

A. Yes, sir.

Q. And then what happened?

A. What happened?

Q. Yes, what took place then?

(Testimony of Mike Sandoval.)

A. Well, I guess they continued smoking, I guess.

Mr. Primock: I move that that be stricken, stating a conclusion of the witness.

The Court: Yes. He said he "guessed" they continued smoking. [166]

Mr. Thurman: He said he went back to the room, I was trying to get the next step, that is all.

The Court: All right.

Q. (By Mr. Thurman): Now, you say you made a trip to San Diego? A. Yes.

Q. Did you discuss that trip to San Diego with any one of these defendants prior to the time you left?

A. Those guys never said anything in front of me, they always went to the front room. I lived at the back room, and when they said they was going to the fights, they invited me to go to the fights with them. I went with them.

Q. And who told you they were going to the fights? A. Arthur Leyvas.

Q. Who? A. Arthur Leyvas.

Q. And just tell us what he told you about that.

A. Well, they were planning they were going to the fights to Los Angeles and then they was talking, Connie and Colimo, at breakfast time, one morning, and he said—they say they was going to see a friend of his in Tijuana.

Mr. Primock: Now, I am going to object to this as [167] immaterial.

(Testimony of Mike Sandoval.)

The Court: Oh, no, that might be very important.

Q. (By Mr. Thurman): Did they say what they were going over there for to see, the fights?

A. Well, Arthur was talking to Connie about seeing this man. I asked him if they was going to bring some stuff.

Mr. Primock: I move that that be stricken as being an assumption of the witness.

The Court: All right, it may be stricken.

Q. (By Mr. Thurman): Who went with you in this car to California?

A. Well, Arthur, Colimo, I, Arnold and a fellow by the name of Manuel Gomez.

Q. What car was it you went in?

A. In Arnold's car.

Q. Arnold Enriquez' car? A. Yes, sir.

Q. What kind of car is it?

A. Cadillac, 1942, green car.

Mr. Thurman: You may cross-examine.

### Cross-Examination

By Mr. Primock:

Q. Mr. Sandoval, this night that all of these people were smoking opium, you didn't see [168] Arnold Enriquez smoke any opium, did you?

A. No.

Q. Pardon?

A. No, I didn't see him. He came in the house, but I didn't see him.

Q. On the morning at breakfast when Connie

(Testimony of Mike Sandoval.)

and Arturo were talking about going to see this friend, was Arnold Enriquez present?

A. No, it was only I and Colimo and Connie and Arthur.

Mr. Primock: That is all.

Mr. Thurman: That is all.

(The witness was excused.)

### VIRON ELKINS

was recalled as a witness and testified further on behalf of the Government as follows:

#### Redirect Examination

By Mr. Thurman:

Q. You are the same witness that previously testified in this case, Mr. Elkins, are you not?

A. Yes, sir.

Q. And during your connection with this matter did you meet Officers Rogers, Street, Meloche, Brown, Lorenz and Smith?

A. What was the first name you mentioned?

Q. Rogers, Officers Rogers—I haven't got his first name—Street, Meloche, Brown, Lorenz, and Smith.

A. Well, not Rogers and Brown, I don't remember, but the others I know.

Q. About when was that, do you remember the date, about, approximately?

A. Oh, it was around August—in August sometime.

Q. What year, Mr. Elkins?

A. '48.



(Testimony of Mike Sandoval.)

Q. And was Agent Earl Smith there on that date?      A. I think so, yes, sir.

Q. Now, what did you and Earl Smith do, if anything, on that date?

Mr. Primock: May it please the Court, I am going to object to this, no proper foundation.

Q. (By Mr. Thurman): Where was it that you met Earl Smith that day?

A. Well, I first met him at Tovrea—by the Tovrea Packing Company.

Q. About what time was that?

A. Oh, in the morning around 10:30, something like that—10:00 o'clock.

Q. Who was there?

A. Oh, Mr. Smith and Lorenz, Mr. Lorenz and some [170] more officers. This man Street you are talking about was there. What date in August is this you are asking me about?

Q. In order to refresh your memory, it is August 19th.      A. Yes, that is the date.

Q. Now, what took place between you and Earl Smith at that time and place on that day?

A. Well, Mr. Smith instructed me to see if I could buy five cans of opium from Arthur Jerez or Colimo.

Q. And what was done with respect to that?

A. Well, I went to the Pirata Inn, or the little Spanish restaurant east, just next door, east of Pirata's Inn, and Jerez came out, or "Colimo" as I know him, came out and got in the car with me,

(Testimony of Viron Elkins.)

he seemed to drive up evidently, and we drove west on Washington Street, a few blocks, and I told him what I wanted, that I wanted five cans of opium, and I turned around and came back, and I let him out there at Pirata's Inn, and I went on home. He told me he would be over there around 1:00 o'clock—or 1:30, with the opium, so I went back to Tovarrea's, picked up Mr. Lorenz and Street, I believe that is the man's name, and we went back to my house, and they went into my barn, and I went [171] in the house, and at 1:00 o'clock, or the time arranged around noon, why, Colimo drove into my yard in the Chevy, the old Chevy, I guess about a '31 model, delivered to me five cans of opium.

Q. And how was this opium packed, or what was it in, if anything?

A. I believe it was in a paper bag. It was in cans, regular opium cans like they put opium in.

Q. Where were you when this opium was handed to you?      A. In the yard.

Q. In the yard?

A. Yes, sir, the east part of my yard next to the barn.

Q. After you got that particular smoking opium what did Jerez do, or Colimo?

A. I paid him \$1375 for it and he turned around and drove off.

Q. Then what took place?

A. I turned it over to Mr. Lorenz and Street.

(Testimony of Viron Elkins.)

Q. How soon after Colimo drove away did you hand it over to Mr. Lorenz?

A. Oh, just a minute, I guess, they was right there close. I just walked in there and gave it to them.

Q. Handing you Government's Exhibit 5 [172] for identification, I will ask you to examine that exhibit and see if this is the one you turned over to Lorenz, as you testified?

A. Well, that looks like that, sir.

Q. Did you mark the sack, do you remember or not?

A. I wouldn't say for sure. I thought I did, but I don't see my initials here. I remember—I believe you will find my initials on the top of this Prince Albert can is the one, this top, or on the other end. If you melt it off, I believe you will find my initials there. Somewheres on that sack I thought I initialed. I don't see it, but I believe it is the sack that he gave me.

Q. All right. Now what took place as far as you are concerned with this case subsequent to this time you just told us about, Mr. Elkins?

A. You mean since then?

Q. Well, the next thing where you appeared in the picture again.

A. December 16th, I bought an ounce of heroin from Art Leyvas at my house.

Q. What did you do with that ounce of heroin?

A. Turned it over to Mr. Earl Teets, the Narcotic Agent.

(Testimony of Viron Elkins.)

Q. Tell as about the facts on the purchase of that particular heroin.

A. Well, on December 15th, Mr. Teets and I went over to Ray Leyvas' mattress factory at 1501, it is known as the Phoenix Mattress Factory, 1501 East Adams Street, and I went in and discussed with Mr. Leyvas the purchase of an ounce of heroin for a man out in the car which I told him was a friend of mine from Reno, I believe, so Ray—and I also discussed with him the price of repairing a couple of mattresses, and Ray told me after studying a few minutes he thought he could arrange the purchase of it, he could get it for me. He said he would be over at my house the next day, which was December 16th. He came over there around noon the next day, picked up the mattress. I asked him if he brought the heroin with him, and Ray Leyvas said, no, that he would be back around 5:30 with the mattress and that he would bring it then. He came back around 5:30 that evening. In the meantime, Mr. Smith and Lorenz came in there. Mr. Earle Teets was already at the house at noon when this man came in. During the afternoon, between 4:00 and 4:30, Mr. Smith and Lorenz, I believe Mr. Lorenz was there at noon, I am not sure, but anyhow, him and Smith was there when this man came back at 5:30, this man I talked to, Ray Leyvas, and when [174] he came in the yard with the mattress on his truck, he had in the seat of the car with him a man he introduced to me

(Testimony of Viron Elkins.)

as Art Leyvas, and a woman who Ray Leyvas told me when he took the mattress around, known as Connie Leyvas, or Duarte, I believe, and so when he took the mattress around in there I asked him if he brought the heroin with him and he said, "No." He said, "I brought my brother out there, I will introduce you to him and he will fix you up," so we went back to the truck. I gave him a check for the mattress and he introduced me to his brother who got out of the truck, and he asked me what I wanted, and I told him I wanted—I had a friend that wanted an ounce of heroin. In the meantime, though, they insisted they didn't want to meet anybody, they would not—both Ray and Art Leyvas said they didn't want to meet any strangers, they wouldn't deal with them, so I told Art Leyvas what I wanted, and he said he had it but he would have to take a little time to get it, he would be back. I don't remember what else we talked about, but anyhow, in the conversation he gave me a capsule of morphine, that is what he said it was, he wanted me to try it or have this man try it, and so I took the morphine. He got back in the truck and left with the expectations—we expected [175] him back in a short time. He didn't say just how long. He said, "In a short time," so I took the capsule and turned it over to the narcotic agents.

Q. Which one?

A. Mr. Smith, at 5:30 in the evening that this happened, along about that time, and then at 7:30,

(Testimony of Viron Elkins.)

it was dark, it was in the Fall—pardon me, at 7:30, he came back. We had the floodlights on in the yard. He drove into the driveway, but he didn't drive the car into the floodlight. He got out and came on afoot, walked into the floodlight, and the agents was watching him through the window and I met him out in the yard a short distance from the house, I'd say 10 or 15 feet, something like that. He pulled out of his pocket an envelope, I believe it was in tissue paper, or oil paper, whatever you might call it, white paper. He said it was heroin. I told him I'd have to take that into the house, the man buying it was in there, he had the money, he would have to look it over, I had to get the money for it. He said, "Okay." I went in, and Teets—Earl Teets took the paper and gave me the money, \$650, and I took it out and gave it to Art Leyvas, and I think that is about all that took place at that time.

Q. Now, what next activity did you take in this matter, [176] Mr. Elkins?

A. On—in January, some time, I believe it was along the middle of January, around the 14th of January, the 14th, I made contact with Mr. Art Leyvas. Well, I went over to the mattress factory to see if I could get hold of him. I got hold of Ray Leyvas and talked to him and told him that Art was up at the house and I went up there and told him I wanted to buy \$50 worth of black stuff. That was known as opium, so he told me he had something. Well, they telephoned down to him. I got up there



(Testimony of Viron Elkins.)

and he wasn't there, and they telephoned down to him and got hold of him and he came up there. No, I think—I am getting ahead of my story. I knocked at the door this time and then a man came to the door.

Q. Which man came to the door?

A. Art Leyvas, and he told me that he—I am being mixed up a little on my date—I am not sure, but anyhow I bought \$50 worth of opium from him.

Q. Where was Teets at that time, Earl Teets?

A. He was in the trunk of my car, the back end of my car.

Q. And how long did Mr. Teets stay in the trunk of your car at that time?

A. Oh, he stayed there all the time we was there. [177]

Q. And did he ever get out of the trunk of the car?

A. While we was there.

Q. When did he get out, if he ever did get out?

A. Oh, after we got away from the place, of course, we got—contacted with Mr. Smith and he got out.

Q. And on January 14th, 1949, at the time Mr. Teets was in the trunk of the car, you had that conversation with him?

A. How is that?

Q. Who did you have your conversation with that day?

A. Well, I believe it started out with Ray Leyvas down at the mattress factory, and he told me to go see Art, his brother.



(Testimony of Viron Elkins.)

Q. Was the purchase made that day?

A. Yes, sir.

Q. And how much?

A. It was \$50 worth of opium.

Q. What form was it in?

A. Just common opium.

Q. All right, what kind of container?

A. In a jar, may have been two small jars, I don't know. I believe it was one jar, if I am not mistaken. I wouldn't say for sure, but I initialed it. [178]

Q. Who did you turn that over to?

A. Mr. Smith and Lorenz, one of them, I don't recall which one, but one of them.

Q. You didn't have any form for the purchase of that narcotics from them?

A. No—What do you mean? Government form?

A. Yes.            A. No, sir.

Q. Didn't have any stamps on it?

A. No, sir.

Q. Now, what next did you do in this case, Mr. Elkins, after this particular thing you just mentioned?

A. On February 2d, I believe, nothing more in January—Oh, I might have talked to them, I don't know, but no purchases from them until February 2d, I went over to the mattress factory at 1501 East Adams and tried to buy—let's see, now—no, I went—I believe I went to the mattress factory first, about the same procedure as the other one, and Ray sent me to that house, and I got it from Connie.

(Testimony of Viron Elkins.)

Q. Was anybody with you on this trip?

A. Yes, Earl Teets was in the trunk of the car.

Q. Where did you go that day? [179]

A. 1030 East Moreland, and Connie Duarte sold me \$50 worth of opium.

Q. Did you have any conversation with Connie Duarte at that time concerning the purchase of this opium?

A. Oh, I don't know. I think we talked a little bit. She asked me if I tried to buy this from Ray Leyvas, and I told her that Ray sent me up there. I believe that is about all. I think Art Leyvas, I am not sure about that. I believe, though, that Art was out of town, or something, I don't know.

Q. Did you discuss that fact with Connie Duarte at that time on February 2d?

A. How is that?

Q. On February 2d, 1949, at the time you were at that house with Teets in the back of the car, did you discuss that fact situation with Connie at that time about Art being out of town?

A. Yes, I think so. We talked for awhile. I believe the subject came up while I was talking to her there. I asked her if Ray Leyvas—if they was all in together on this stuff, selling it, and she said no, that they had had some difficulty or argument between them and they sold their stuff. I say "they," that is Ray Leyvas and Colimo, I believe, I wouldn't say for sure whether they [180] mentioned that gentleman there or not, but anyhow, I know

(Testimony of Viron Elkins.)

the other two were mentioned. They said they sold their stuff and Ray sold his, that is what she said, as near as I can remember.

Q. Then what was the next thing you did in this matter?

A. Oh, let's see. On February 8th I came there to buy some—\$50 worth of black stuff, opium, some—I came to the mattress factory and Ray sent me on up there to Art—no, let's see—yes, I did, I come by there and he told me to go up, that Art was home, so I went up there, and when I got up there, I knocked on the door and Connie Duarte came to the door and she said Art wasn't there, she would see if she could locate him on the phone, and she went in and supposed to have phoned, and she said, "Art is down at the mattress factory and said for you to come on down there," so I turned around and got in my car, we was talking very close to the driveway, close to the car. I got in the car and started to back out, and she ran back—The phone rang—ran back, and she came and hollered out, said, "Wait a minute," she said, "This family has gone crazy," I believe is what she said. "They said now for you to wait here." I believe that is the way it was, but anyhow I [181] waited there and pretty soon—

Q. Did you have anybody with you at that time?

A. Yes, Mr. Teets was with me.

Q. Now, what was the next thing you did in this case, Mr. Elkins, that you can remember?

(Testimony of Viron Elkins.)

A. Well, on February 14th, let's see, that was the 8th, the last date I gave you, was it?

Q. Yes.

A. On February 14th, I went there to buy some stuff, to see Art about something. Anyhow, he wasn't there. His wife, or Connie Duarte, told me that he would not be back until the next day, I believe she said, and in the meantime she said, "I got a paper of heroin here I want you to take and try." She gave it to me, a sample, and I left, and I think that was the end of it.

Q. Was Teets with you that day or not?

A. No, no, I don't believe Mr. Teets was with me that day. I think he was not with me.

Q. And this narcotic that you got from Connie on this date, did you turn that over to the officers?

A. Yes, sir; in a few minutes I turned up the street, up on Tenth Street, and turned it over to the three narcotic officers.

Q. Mr. Smith and Mr. Lorenz?

A. Yes, that is right. [182]

Mr. Thurman: You may cross-examine.

The Court: We will have our morning recess at this time, gentlemen. Keep in mind the Court's admonition.

(Thereupon a brief recess was taken, after which, all parties being present as noted by the Clerk's record, the trial resumed as follows:)

## VIRON A. ELKINS

resumed the witness stand and testified as follows:

## Recross-Examination

Mr. Primock:

Q. Mr. Elkins, on all these purchases that you made that you testified to previously and today, Mr. Lorenz was always in the vicinity, was he not?

A. Well, I believe he was, yes, I wouldn't say for sure, but I believe he was.

Q. You saw him at all times prior to making the sale and prior to making the purchase and immediately after making the purchase, did you not?

A. I don't know. I couldn't say that I did. I either seen him or Mr. Smith, one.

Q. Didn't Mr. Lorenz search you each time before he would send you out to make a purchase at Connie Leyvas' or Arthur Leyvas' house on East Moreland?

A. Did he what? [183]

Q. Search you? A. Yes.

Q. And immediately after you made a purchase didn't you deliver to Mr. Lorentz the narcotics that you had purchased from the house?

A. Most of them, I think.

Q. You mean there were some where you didn't see Mr. Lorenz?

A. I didn't see him?

Q. Yes, were there some occasions where you made a purchase at the house on East Moreland Street where you would not see Mr. Lorenz?

A. No, I turned it over to him within a few minutes after I got it.

(Testimony of Viron Elkins.)

Q. When you saw him each time, before you made a purchase and afterwards, didn't you?

A. Either Mr. Smith or Mr. Teets, one.

Q. I want to know if you saw Mr. Lorenz on each occasion.

A. Well, I wouldn't say that I did, no, because I think I did, but I wouldn't say for sure.

Q. Now, I will ask you, Mr. Elkins, whether or not on any of these occasions that you made the purchases of opium or narcotics that you testified to in this trial, whether on any of those occasions you saw this defendant Arnold Enriquez? [184]

A. No, I never have seen that man that I know of. I saw him around the Inn down there, but I don't remember seeing him at any of these places.

Q. You did all of this, Mr. Elkins, while you were earning your thousand dollars, weren't you?

A. Why, yes, I guess that is what you would call it.

Q. That thousand dollars includes your testimony in court, or are you getting extra for that?

A. I am getting paid as a witness.

Q. Just a normal witness fee? A. Yes, sir.

Q. How much is that? A. I don't know.

Q. Didn't you get paid? A. I haven't yet.

Mr. Primock: That is all.

Mr. Thurman: That is all.

(The witness was excused).

Mr. Thurman: Mr. Frank W. Colbert.

## FRANK W. COLBERT

was called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

## Direct Examination

By Mr. Thurman: [185]

Q. Please state your name.

A. Frank W. Colbert.

Q. Mr. Colbert, where do you live?

A. 137 North First Street, Phoenix.

Q. And are you acquainted with this defendant Arnold Enriquez?

A. I have known him several years, yes, sir.

Q. And have you ever been into the club known as, or the restaurant, or whatever it may be, known as Pirata's Cafe—Pirata's Cafe?

A. Pirata's, yes, many times.

Q. Have you ever seen Arnold Enriquez there?

A. Oh, yes.

Q. Do you know a man by the name of Arturo Jerez?

A. Colimo, yes.

Q. Did you have any business with this man Colimo?

A. Oh, yes, I bought drugs from him many times.

Q. Did you ever have any business with this man Arnold Enriques?

A. No direct business, no, sir.

Q. No direct business. Did you ever have any indirect business?



(Testimony of Frank W. Colbert.)

A. Well, I would be in the club looking for Colimo—— [186]

Mr. Primock: I object to that as no proper foundation.

The Court: Yes.

Mr. Thurman: Do you know Okla Johnson, the agent that testified here? A. Yes, sir.

Q. And when did you first meet him?

A. Oh, in the latter part of '48.

Q. And did you become friendly with Mr. Johnson? A. Yes, sir; I assisted Mr. Johnson.

Q. Did you go to places of entertainment together? A. That is correct.

Q. Did you and he go to a prize fight one day?

A. Oh, about the night of January 12th, 1949, we went to Madison Square Garden to a fight.

Q. Did you see anyone there that night other than—Did you see Arnold Enriquez that night?

A. Mr. Enriquez and Mr. Joe Martinez were there together and as they came out I stopped Mr. Enriquez and called him up to the side and asked him if it would be possible to get several cans of opium that night, that we needed it very badly, and he told me there was nothing in town, that Art would be back Friday, that was Mr. Leyvas, and I would have to wait until he got back. [187]

Q. Who was there at that conversation besides yourself and Arnold Enriquez?

A. I don't think anyone overheard it.

Mr. Thurman: You may cross-examine.

(Testimony of Frank W. Colbert.)

Cross-Examination

By Mr. Primock:

Q. How long have you lived in Phoenix, Mr. Colbert? A. About three years.

Q. About three years. Where did you live before you came to Phoenix? A. Denver.

Q. How long did you live there?

A. Oh, approximately five or six years.

Q. How long have you known Arnold Enriquez?

A. Oh, I was in Phoenix, living in Phoenix, before this time. I knew him when I was here before, in '43 and '44.

Q. You worked on this case in behalf of the United States Government, did you not?

A. I assisted, yes.

Q. And you were paid for your services, were you? A. I was.

Q. And how much were you paid?

A. One thousand dollars. [188]

Q. Mr. Colbert, you use narcotics, do you not?

A. I do.

Q. And have you ever been convicted of a felony? A. I have.

Q. And what was that?

Mr. Thurman: I object to that, is is immaterial.

The Court: Yes; he said he was convicted of a felony, that is sufficient.

Q. (By Mr. Primock): Now, on January 12th, 1949, when you went over to see Mr. Enriquez at

(Testimony of Frank W. Colbert.)

the fights, you did so at the request of Mr. Johnson, did you not?       A. I did.

Q. And Mr. Johnson told you on that night to go and see if you could buy some stuff from Enriquez, didn't he?       A. Correct.

Q. And you were not successful in purchasing any?       A. That is right.

Mr. Primock: That is all.

Mr. Thurman: That is all.

(The witness was excused.)

Mr. Thurman: Mr. Earl Smith. [189]

### EARL A. SMITH

was called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Thurman:

Q. State your name.

A. Earl A. Smith.

Q. And where do you live, Mr. Smith?

A. Phoenix, Arizona.

Q. And how long have you lived there?

A. Since the latter part of '44.

Q. Now, what has been your business during that period of time?

A. I have been engaged in enforcing the Narcotic Laws.

Q. Just what is your status, what do they call you?

(Testimony of Earl A. Smith.)

A. Well, I am the agent in charge here in Phoenix, Arizona.

Q. Did you have anything to do with the investigation, the handling of the case against these defendants, Arturo C. Leyvas, Arnold Enriquez, Ray C. Leyvas, Connie Duarte, Arturo E. Jerez, Joe Martinez?

A. I did. [190]

Q. And just what was your responsibility and duties in that particular investigation?

A. Well, I handled the money and went out and witnessed the purchases of this and took care of the evidence, and so forth.

Q. And these Government's exhibits up here that are marked in evidence, Exhibits 1, 2, 4, 5, 6, 7, 10, 12, 13, 14, 15, 18, 20 and 24 for identification were all handled by you in this case?

A. Yes, sir.

Q. And what did you do with those exhibits after they were turned over to you by the witnesses that have already testified to these facts?

A. They were all sent to John W. Custer, Chief Chemist, United States Customs Laboratory, Los Angeles, California, by registered mail.

Q. And I just left out 5, 8 and 9, and did that also happen with respect to Government's Exhibits 5, 8 and 9 marked for identification?

A. Yes, sir.

Q. They were handled in the ordinary course of the business of the Internal Revenue, Narcotic Division, is that correct?

(Testimony of Earl A. Smith.)

A. Bureau of Narcotics Regulations, yes, sir.

Q. What was your first step in this investigation, limiting your evidence, Mr. Smith, to what [191] was actually done in the case after it started?

A. Well, in July—July 22d, I furnished Viron Elkins with \$1375, and with Customs Agents Mel Rogers and Ed Ketchum, I followed Mr. Elkins to this small cafe which is east of Pirata's Inn near Sixteenth and East Washington Streets. Mr. Elkins entered this cafe, and in a few minutes I saw Arturo Jerez, better known as Colimo, drive up in a Cadillac sedan of Arnold Enriquez, and he went into this cafe where I had seen Mr. Elkins go. They came out—Colimo and Mr. Elkins came out and sat in Mr. Elkins' car, and then Mr. Elkins drove away, and I saw Arturo Jerez get in the Cadillac sedan and drive to the home of Ray Leyvas and go in the back door, and in about 15 minutes I saw him, Colimo, drive in this Cadillac car going up Washington Street. About 12:30, I met Agent Lorenz and other officers in Tempe, and Mr. Lorenz showed me a sack containing five cans of smoking opium, and on the way back to Phoenix, Agent Lorenz and Customs Agent Bump and myself, we drove by the Leyvas Mattress Factory and this green Cadillac sedan was parked alongside.

Q. Then what next took place?

A. In August—August 19th, I again furnished Elkins with \$1375, and I followed him with Customs [192] Agents Rogers to Sixteenth and East

(Testimony of Earl A. Smith.)

Washington Streets. Just as he was parking I saw Arturo Jerez, or Colimo, come out of this same cafe and get in the car with Elkins, and they drove west on Washington for a few blocks and made a U turn and came back, and Arturo Jerez got out of Elkins' car and went back in the cafe, and Elkins continued on east, on East Washington, and in about five minutes I saw Joe Martinez drive up in the green Cadillac sedan of Arnold Enriquez and go in this same cafe, and in about ten minutes I saw Joe Martinez come out of this cafe and get in the Cadillac and drive up town, where I lost him.

About 2:00 p.m. of that day I saw Art Jerez driving a '31 Chevrolet known as the Green Hornet, come driving west on East Washington, and drive into the driveway at 1505 East Adams, just between the Leyvas Mattress Factory and the home of Ray Leyvas. I then went to the office, and Agent Lorenz showed me a sack containing five cans of prepared smoking opium.

Q. What was the next transaction?

A. On the night of November 5th, 1948, about 8:30 p.m., I saw Frank Colbert come walking west on East Monroe and go into the Normandie Hotel. In [193] just a few minutes I saw Art Leyvas go into this hotel, and in about 15 minutes later I saw Art Leyvas and Frank Colbert come out of this hotel together, and in a short time I saw Narcotic Agent Johnson come out of this hotel, and I followed him to his room and he turned over to me a



(Testimony of Earl A. Smith.)

small package of heroin and four cans of prepared smoking opium.

Q. Can you tell us what the next episode was?

A. Well, let's see. It was the next day, I saw Art Leyvas pick up Narcotic Agent Johnson in an old car and drive out of my sight, and they came back in about 20 minutes and I saw Agent Johnson get out of the car and I followed him to his room, and he turned over to me a package of heroin and some mixing powder.

Q. What was the next thing that took place in this case?

A. Well, on November 14th, I saw Connie Duarte talking with Narcotic Agent Johnson and Frank W. Colbert on the stairway leading into the Normandie Hotel, and I saw her leave and come back in about 40 minutes and hand something to Johnson, and I saw Agent Johnson, it looked like he was paying her money.

Q. Did you ever find out what that something was that was handed to him?

A. I met him in his room and he turned over to me a package of heroin.

Q. How big a package?

A. Oh, about a half ounce, I would estimate.

Mr. Thurman: One of these exhibits here?

A. Yes, sir.

Q. What next happened?

A. Well, on December 16th, 1948, Narcotic Agent Lorenz and I went to the home of Viron Elkins



(Testimony of Earl A. Smith.)

east of Tempe, Arizona. About 5:30 p.m. I saw Ray Leyvas and Art Leyvas drive in the Elkins yard in a red Dodge truck on which was painted "Phoenix Mattress Factory." I saw Elkins talk with Ray Leyvas, and then I saw Art Leyvas get out of the truck and shake hands with Elkins, and in a few minutes I saw Art Leyvas hand—reach in his pocket and hand Elkins a small object, and then Art Leyvas and Ray Leyvas drove off in the truck and Elkins came and turned over to me a capsule of morphine.

Later, about 7:15—7:30, I saw Art Leyvas walk into the light of a floodlight, and I saw Elkins go out and meet him and saw Art Leyvas hand Elkins a package containing a white substance, and I saw Elkins go in the house and come back and [195] I could hear him counting out some money, and could see him going through those motions. I heard Art Leyvas tell him that he had two ounces of morphine that was not of the best quality, but he wanted \$400 an ounce for that morphine.

Q. All right, what is the next thing that took place?

A. On January 14th, 1949, I furnished Mr. Elkins with \$50, and Narcotic Agent Earl Teets got in the truck compartment of his automobile. Narcotic Agent Lorenz and I followed Mr. Elkins' automobile to the Phoenix Mattress Factory at 1501 East Adams. I saw Ray Leyvas come out and stand by the car for about ten minutes and I then

(Testimony of Earl A. Smith.)

followed Mr. Elkins' car to 1030 East Moreland Street, where I saw him get out and go up and talk with someone at the door. He started to back away and then he went back into the driveway, and then a short time, Art Leyvas drove up there in a '41 Chevrolet coupe with a Louisiana license. I saw Art Leyvas get out and stand at the side of the car for a few minutes, and then I saw Elkins and Art Leyvas enter 1030 East Moreland. About 20 minutes after that I saw Elkins leave and he turned over to me a small package of heroin and a jar of opium. [196]

Q. One of the exhibits here?

A. Yes, sir.

Q. Now, what was the next thing that took place?

A. Well, that night I——

Mr. Primock: What date is that, again?

A. January 14th. That night I followed Narcotic Agent Johnson to Pirata's Inn, and about 9:00 or 9:30 I saw Narcotic Agent Johnson and Arturo Jerez, or Colimo, come out of this Club and enter Agent Johnson's car and drive north on Sixteenth Street. Agent Lorenz and I then drove by 1030 East Moreland Street, and the car of Arnold Enriquez was parked in front. Later, about 10:00 p.m., Agent Lorenz and I again drove by 1030 East Moreland, and a '41 Chevrolet coupe that I had seen Art Leyvas driving was parked behind Arnold Enriquez' automobile.

Q. Tell us what next took place.

(Testimony of Earl A. Smith.)

A. On January 15th, I saw Charles Cobos dial telephone 4-3914.

Q. Who? A. Charlie Cobos.

Q. Who is Charlie Cobos?

A. He is the man that was assisting me in this investigation.

Q. And what date did you say this was? [197]

A. That was on January 15th.

Q. '49? A. Yes, sir.

Q. Where did this take place?

A. At the drug store at the corner of, I believe it is Henshaw and South Central Avenue.

Q. What did you see him do there?

A. Dial this telephone 4-3914.

Q. 4-3914? A. 4-3914, yes, sir.

Q. And did you know at that time whose telephone number it was?

Mr. Primock: I object to it as not the best evidence.

The Court: He may answer if he knows.

A. It is listed in the telephone book to Arnold Enriquez at 2022 East Moreland.

Mr. Primock: I move that it be stricken on the grounds it is hearsay.

The Court: It may stand.

A. About 2:00 p.m. after the telephone call I searched Mr. Cobos and furnished him with \$50, and Mr. Cobos went to his home at 1018 South First Street. At 1:45 p.m., maybe 2:00 p.m., I saw Joe Martinez and Ernest Hayworth driving

(Testimony of Earl A. Smith.)

a black Cadillac sedan, and Ernest Hayworth drove up in [198] front of 1018 South First Street. I saw Joe Martinez get out of this car and go in and knock, and I saw Cobos come out into the yard, and I—after a few minutes' conversation, I saw Joe Martinez hand Cobos something, and I saw Cobos pay him—Martinez, what appeared to be money.

Q. And after you saw this transaction what took place then?

A. Cobos, Joe Martinez, then went out and got in the car for a few minutes with Ernest Hayworth and then Cobos got out and he walked south and came to Agent Lorenz and myself and turned over to us a jar of opium.

Q. And after you received that jar of opium, what did you do with it?

A. I sent it to the office of the chemist by registered mail.

Q. I hand you Government's Exhibit 23 for identification, Mr. Smith, I will ask you to examine it.

A. That is not the one—this one here is not the one.

Q. Is this the one you have reference to?

Mr. Primock: What is the number of it?

Mr. Thurman: I want to find out first, I am not sure. [199]

A. No, it is the one right behind it (indicating counsel table).

(Testimony of Earl A. Smith.)

Mr. Thurman: Will you go on the desk and find the one?

(The witness complies.)

Q. (By Mr. Thurman): This is Government's Exhibit 19 for identification. I will ask you to examine that and see if you can identify the exhibit contained therein.

A. Yes, sir; this is a jar of opium that Cobos turned over to Agent Lorenz and myself.

Q. What date was that again?

A. That was on January 15th, 1949 at 1:45 p.m.

Q. And what did you do with that after you got it?

A. Sent it to the United States Chemist at Los Angeles, California.

Q. All right. Now, proceed, do you know where you were when I interrupted you?

A. Well, on February 6th, 1949, I again saw Charlie Cobos dial telephone 4-3914.

Q. And where?

A. From this same drug store at Henshaw and South Central Avenue. I heard him talk to someone which he called "Pirata" in Spanish.

Mr. Primock: I move that that be stricken as hearsay.

The Court: Oh, it may stand.

The Witness: About 11:00 a.m., I searched Mr. Cobos and furnished him with \$50, and about 11:00 a.m. I saw Joe Martinez drive up in front of Mr.

(Testimony of Earl A. Smith.)

Cobos' house at 1018 South First Street in a '37 Chevrolet sedan. I saw Joe Martinez get out, knock on Mr. Cobos' door, and Mr. Cobos and Martinez entered this car and sat for about ten or fifteen minutes, and I could see their shoulders moving like this (indicating). Joe Martinez then drove off and Mr. Cobos walked down the street followed by Agent Lorenz and I back where we met down there, and Mr. Cobos turned over to me a jar of smoking opium.

Q. Which one was that?

A. I then drove rapidly across town to the vicinity of 2022 East Moreland Street, the home of Arnold Enriquez, and I saw Joe Martinez parking in this car, a Chevrolet car, in front, and enter the front door of the home of Arnold Enriquez.

Q. That was immediately after you got the——

A. Immediately after, yes, sir.

Q. ——the narcotics from Cobos?

A. That is right. [201]

Q. Handing you Government's Exhibit 22 for identification, I will ask you to examine that exhibit and state whether or not you can identify it.

A. Yes, it is the contents of the jar of opium turned over to me by Carlos Cobos on February 6th, 1949, at 11:05 a.m.

Q. And what did you do with that in your capacity as such narcotic agent?

A. I sent it to the United States Chemist at Los Angeles by registered mail.

Q. Now, what took place after this episode?



(Testimony of Earl A. Smith.)

A. Well, on February 8th, 1949, I again saw Carlos Cobos dial telephone 4-3914. I heard him talk in Spanish, and he hung up. I then saw him dial telephone 9-6327.

Q. 9-6327?

A. And he said in English, "Let me speak"——

Mr. Primock: I object to what he said as being hearsay.

The Court: He may answer.

A. "Let me speak to Pirata." He then carried on a conversation in which the name "Pirata" was mentioned several times, and then hung up. I then searched Mr. Cobos and furnished him with \$50. At about 2:30 p.m., I saw Arnold Enriquez drive in a '47 Chevrolet automobile on the side of which was "A.A-1 Corporation, Car No. 13." Art Leyvas was sitting beside him. I saw Cobos come out of the door of the car—of his house, and got in the car with Arnold Enriquez and Art Leyvas and talk for about 20 minutes. I saw Arnold Enriquez make a U turn, and I followed Arnold Enriquez and Art Leyvas back to 1030 East Moreland Street, where they parked this Chevrolet car in the driveway.

In a short time I saw Joe Martinez come out and get in this same car, and I drove rapidly back to where I could see 1018 South First Street, and when I arrived there, I saw Joe Martinez in this same Chevrolet car, and Charlie Cobos was sitting beside him. In a few minutes I saw Charlie Cobos get out of his automobile and Agent Lorenz followed him out of the front door, and I went down



(Testimony of Earl A. Smith.)

back to where I met Charlie Cobos, and he turned over to me a jar of opium.

Q. (By Mr. Thurman): And what was the date that you gave for that?

A. That was February 8th.

Q. Handing you Government's Exhibit No. 23 for identification, I will ask you to examine it and see if you can identify it. [203]

A. Yes, sir; this is a jar of opium that was turned over to me.

Q. By Mr. Cobos? A. Cobos.

Q. What did you do with that?

A. That was sent by registered mail to the United States Chemist at Los Angeles.

Q. You handled that in the same manner as you did all of these other exhibits? A. I did.

Q. Well, what else happened after that?

A. Well, after receiving the opium from Mr. Cobos, Mr. Lorenz and I drove to 1030 East Moreland and we did not see the Chevrolet coupe there. We started to leave when we saw Joe Martinez driving up and he drove back into the driveway of 1030 East Moreland and enter 1030 East Moreland.

Q. Now, what is the next thing you participated in in this case?

A. Well, on February 9th, I appeared before the United States Commissioner and swore to complaints against Arnold Enriquez, Art Leyvas, Connie Duarte, Joe Martinez and Arturo Jerez.

Mr. Thurman: You may cross-examine. [204]

(Testimony of Earl A. Smith.)

Cross-Examination

By Mr. Primock:

Q. Mr. Smith, you testified that you are the agent in charge of this area? A. Yes, sir.

Q. And you are responsible for everything that is in this area?

A. No, I am not responsible for it.

Q. I mean you are the head man, are you not?

A. Most everything is referred to me, yes, sir.

Q. You handle all of the narcotic investigations in this area, do you not?

A. Well, no.

Q. You are the agent in charge?

A. Yes, but I can't personally do everything myself.

Q. I don't mean you, personally, but I mean you are in charge of all of the investigations.

A. I am held responsible, yes, sir.

Q. Does that area include all of Arizona?

A. Well, it includes the district which includes Arizona. Sometimes it may include California or Nevada or Texas.

Q. I know, but you are the responsible head agent in charge for what area?

A. For Arizona. [205]

Q. Arizona only, is that correct? A. Yes.

Q. And you have the discretion, do you not, of spending money in your investigation of cases?

A. No, I can't personally spend a dime without

(Testimony of Earl A. Smith.)

the approval from the Commissioner in Washington.

Q. Well, when you put out this, like on July 22nd, 1948, you gave Mr. Elkins \$1375. Did you write to Washington or notify Washington that you wanted to give Elkins \$1375?

A. Yes, they knew about it and it was——

Q. Just answer my question. Did you, before you put out that \$1375, get permission from Washington telling them you were going to spend \$1375 by giving it to Informer Elkins to purchase some narcotics?

A. Yes, it was part money furnished by the Bureau and the Customs.

Q. It was not your money?

A. Half belonged to the Bureau of Narcotics and half belonged to the Bureau of Customs.

Q. Before you spent your half, which would be a little over \$600, you had permission from Washington to give that money to Elkins?

A. I did.

Q. Was that by letter or what? [206]

A. Teletype.

Q. On July 22d, when you gave Elkins that \$1375 and he consummated the sale with Colimo that you watched, did you see this defendant Arnold Enriquez present?

A. No, sir.

Q. How much money did you expend altogether in the investigation of this case?

A. Well, the Bureau of Narcotics spent a little

(Testimony of Earl A. Smith.)

over \$4000 and the same amount with the Bureau of Customs.

Q. In other words, a total of \$8000?

A. Yes, sir.

Q. How would you account to the Government for your money after it was spent?

Mr. Thurman: Just a minute, I object to that as irrelevant, incompetent and immaterial, no place in the case.

The Court: Yes.

Q. (By Mr. Primock): Did you have permission from Washington to pay Frank Colbert \$1000?

A. Our Bureau paid Frank Colbert \$1000, and the Bureau of Customs paid Mr. Elkins \$1000.

Q. Just answer my question, Mr. Smith.

A. I did.

Mr. Thurman: I object, it is immaterial and incompetent.

The Court: Well, he has answered the question.

Mr. Primock: If the Court please, I asked him if he had permission from Washington.

Mr. Flynn: He said Washington spent it.

Q. (By Mr. Primock): On August 19th, 1948, when you furnished Elkins \$1375 and he made a purchase from Joe Martinez, did you see this defendant Arnold Enriquez present?

A. I did not.

Q. On November 5th, 1948, when Colbert and Johnson purchased some stuff from Art Leyvas, how much money did you advance to Colbert and Johnson, if any?

(Testimony of Earl A. Smith.)

A. I advanced to Narcotic Agent Johnson \$1000.

Q. Did you see Arnold Enriquez present on that day, or at that time? A. No, sir.

Q. Pardon? A. No, sir.

Q. On November 6th, 1948, when Johnson made a purchase from Arturo Leyvas, did you advance any money to Johnson at that time? A. I did.

Q. How much did you advance him?

A. \$475, as I recall. [208]

Q. And on November 6th, 1948, when that sale was consummated between Arturo Leyvas and Colimo and Johnson, did you see this defendant Arnold Enriquez? A. No, sir.

Q. On November 19th, 1948, when on the stairway of the Normandie Hotel when Johnson purchased some opium from Connie Duarte, or Connie Leyvas, how much money did you advance Johnson for that sale? A. \$325.

Q. And did you see Arnold Enriquez, this defendant, present at that time? A. No, sir.

Q. On December 16th, 1948, at the home of Elkins in Tempe, where Ray and Art came over, how much money did you advance Elkins at that time?

A. I advanced \$650 to Narcotic Agent Teets.

Q. How much? A. \$650.

Q. \$650. And did you see Arnold Enriquez present on that day and place? A. No, sir.

Q. Later that evening, on the same day, on December 16th, 1948, when you saw Art Leyvas come back and hand Elkins a package, did you see Arnold

(Testimony of Earl A. Smith.)

Enriquez present? [209]           A. No, sir.

Q. On January 14th, 1949, when the purchase was made in front of the home of Arturo Leyvas on East Moreland Street, how much money did you advance for that purpose?           A. \$50.

Q. And did you see Arnold Enriquez present at that time?           A. No, sir.

Q. And on January 14th, 1949, when you followed, or when you saw, rather, Johnson and Colimo come out of Pirata's Inn and drive north on Sixteenth Street did you see Arnold Enriquez at that time?           A. No, sir.

Q. And how much money did you advance for that purchase?           A. \$1000.

Q. Now, on January 15th, 1949, when you went down, you were at Cobos' home and you said Joe Martinez and Ernest Hayworth drove up in a Cadillac car?           A. Yes, sir.

Q. What color was that Cadillac car?

A. It was a black Cadillac, '46 model.

Q. And you say you saw Joe Martinez hand Cobos a package? [210]           A. I did.

Q. How much had you advanced Cobos prior to that?           A. \$50.

Q. Did you see Arnold Enriquez at that time and place?           A. No, sir.

Q. Now, on February 6th, 1949, when you advanced Cobos some more money, did you not?

A. I did.

Q. How much did you advance him then?

A. \$50.

(Testimony of Earl A. Smith.)

Q. And he made another purchase, you say, from Joe Martinez in the automobile?

A. He did.

Q. And at that time and place did you see this defendant Arnold Enriquez?

A. No, but I followed him back to Arnold Enriquez' home.

Q. You didn't see him at the time of the purchase though?           A. No, sir.

Q. Now, on February 8th, 1949, how much did you advance Cobos to make a purchase?

A. \$50.

Q. You say this purchase took place at what time? [211]

A. Well, I didn't witness that purchase.

Q. You didn't witness it?           A. No, sir.

Q. Were you present when Arnold Enriquez was arrested?

A. I saw him later, about 30 minutes after his arrest.

Q. But you weren't present at the time of the arrest?           A. No, sir.

The Court: We will suspend until 2:00 o'clock. Keep in mind the Court's admonition.

(Thereupon a recess was taken at 12:05 o'clock noon of the same day.)

2:00 o'Clock, P.M.

All parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:



## EARL A. SMITH

resumed the witness stand and testified further as follows:

## Cross-Examination

(Resumed)

By Mr. Primock:

Q. Mr. Smith, how much did you and the Government pay Mr. Cobos for his work in this case?

A. Well, I didn't pay him anything.

Q. To your knowledge, did the Government or any of the others pay him anything?

A. Not for any work on this particular investigation.

Mr. Primock: That is all.

Mr. Thurman: Just one thing I forgot.

## Redirect Examination

By Mr. Thurman:

Q. Please mark the purported judgment in No. C-10038, Tucson, as a Government's exhibit.

(Thereupon the document was marked as Government's Exhibit 29 for identification.)

Q. (By Mr. Thurman): How long have you known this defendant?

A. Since the latter part of '44.

Q. I hand you Government's Exhibit 29 for identification and ask you to look at it and I will ask you if the person named therein is the same person as Arnold Enriquez that sits here at the table, the defendant in this case?

(Testimony of Earl A. Smith.)

A. Yes, sir.

Mr. Thurman: The Government now offers in evidence Government's 29 for identification.

Mr. Primock: If the Court please, we have [213] some objections to this which we would like to make in the absence of the jury.

The Court: Well, let me see what it is.

(Thereupon the document was handed to the Court.)

The Court: Well, I think you can state your objections to it.

Mr. Primock: If the Court pleases, it is improper and immaterial; incompetent. It goes to the offenses which are not in issue at this time. It goes to impeach the defendant who has not at this time taken the witness stand.

The Court: Well, the general rule is that evidence of other offenses is admissible on the question of intent.

Mr. Primock: Providing they are within a reasonable period of time, your Honor. This is something supposed to have happened many years ago.

The Court: It happened five years ago. It will be received and the Court will limit the effect by proper instruction.

Mr. Thurman: Will you mark it in evidence, please?

(The document was marked as Government's Exhibit 29 in evidence.)

(Testimony of Earl A. Smith.)

GOVERNMENT'S EXHIBIT NO. 29

In the United States District Court for  
The District of Arizona

No. C-10038-Tucson

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARNOLD S. ENRIQUEZ,

Defendant.

Due proceedings having been had on the Indictment filed herein presented against the defendant above-named charging a violation of Title 21, United States Code, section 174 and Title 26, United States Code, section 2553 as charged in counts 2 and 3 thereof.

It Is Ordered, Adjudged and Decreed that said defendant is guilty of said crime and in punishment thereof that said defendant be committed to the custody of the Attorney General of the United States or his duly authorized representative for imprisonment in such place of confinement as the said Attorney General shall designate for a term of two (2) years and six (6) months on each of said counts 2 and 3, said terms of imprisonment to run concurrently with each other and that said defendant be fined in the sum of \$1,000.00 on count 2 and in the sum of \$500.00 on count 3, and that in default of

(Testimony of Earl A. Smith.)

payment of said fines he stand committed until the same are paid or he is otherwise discharged by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Dated at Tucson, Arizona, March 5, 1945.

/s/ ALBERT M. SAMES,  
Judge.

A True Copy. Certified this 5th day of March, 1945.

EDWARD W. SCRUGGS,  
Clerk.

JEAN E. MICHAEL,  
Deputy.

[Endorsed]: Filed March 5, 1945.

Admitted April 27, 1950.

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Mr. Thurman: The record may show that I am now [214] reading Government's Exhibit 29 in evidence to the jury.

(Thereupon Exhibit No. 29 was read to the jury by Mr. Thurman).

Mr. Thurman: That is all.

(The witness was excused).

Mr. Thurman: Mr. Nicholson.

REDVERS G. NICHOLSON

was recalled on behalf of the Government, and having been heretofore duly sworn, testified as follows:

Redirect Examination

Mr. Thurman:

Q. I hand you Government's Exhibit 19, and see if you can identify that.

A. Yes, we received this in our laboratory.

Q. Did you make an analysis of it?

A. I did.

Mr. Primock: I object as no proper foundation being laid.

Q. (By Mr. Thurman): Who did you receive it from?

A. We received it from the Bureau of Narcotics—I will state which gentleman it is. We received that from Mr. Robert Lorenz of the Bureau of Narcotics, Phoenix, Arizona. [215]

Q. In the regular course of business of handling such matters? A. Beg pardon?

Q. In the regular course of business of handling such matters? A. Yes, sir.

Q. How did it arrive at your place of business?

A. By registered mail in this envelope.

Q. After that exhibit arrived in this laboratory, please tell the Court and jury what was done with respect to that exhibit?

A. The outside envelope was opened up, a rec-

(Testimony of Redvers G. Nicholson.)

ord was made of this, and it was then placed in the vault until such time as it was analyzed. It was then analyzed, resealed, placed in the vault until such time I was ordered to bring it into this courtroom.

Q. Did you bring it into this courtroom?

A. I did sir.

Q. After you left Los Angeles with it, did anybody touch it until you got it here in the courtroom?

A. No, sir.

Q. Only yourself?                      A. Yes, sir.

Q. What does the analysis of that particular exhibit [216] show?

A. The sample contains prepared smoking opium.

Q. I hand you Government's Exhibit 23 marked for identification, and ask you to examine it and see if you can identify it.                      A. Yes, sir.

Q. And how do you identify it?

A. This is an exhibit, originally No. 24. It was received in our Los Angeles office on February 15th, 1949.

Q. And how was it received?

A. By registered mail in this envelope.

Q. And after it arrived at the laboratory in Los Angeles by registered mail, what was done with it, if you know?

A. The outside envelope was opened up, a record made from the data on the outside, and was sealed in the envelope inside, and then placed in our vault until such time as it was brought out to be analyzed, then analyzed, resealed, and placed back

(Testimony of Redvers G. Nicholson.)

in the vault until such time as ordered here by the Court.

Q. It was handled in the regular course of business in handling such matters? A. Yes, sir.

Q. What does the analysis of this sample [217] show?

A. The analysis of this sample shows it is prepared smoking opium.

Q. Will you tell us what officer you received it from?

A. Oh, it was received from Mr. Lorenz, from the Bureau of Narcotics, Phoenix, Arizona.

Q. Now, I hand you Government's Exhibit 23 for identification and ask you if you can identify the exhibit.

A. Pardon me, this is 22, is it not?

Q. 22, yes. Thank you.

A. This, we received this sample from Mr. Earl Smith of the Bureau of Narcotics, Phoenix, on February 8th, 1949.

Q. And how did you receive it?

A. Received it by registered mail in this envelope.

Q. And was that other envelope and its contents contained in that envelope? A. Yes, sir.

Q. What took place after you received it at the laboratory in Los Angeles by registered mail?

A. The outside envelope was opened up, a record made of the contents from this writing on the inside envelope, placed in the vault until such time it was to be analyzed, then taken out, [218] ana-



(Testimony of Redvers G. Nicholson.)

lyzed, resealed, placed back in the vault until such time as I was ordered to bring it in to this court here.

Q. You made analysis of it, did you?

A. Yes, sir.

Q. And what does the analysis show?

A. Prepared smoking opium.

Mr. Thurman: That is all.

Recross Examination

By Mr. Primock:

Q. Mr. Nicholson, have those exhibits been in your possession all of the time?

A. In our vault and then in my possession all the time I was bringing it into this courtroom.

Q. But subsequent to the analysis, after—after you made the analysis, what did you do with them?

A. I sealed them up and placed them in the vault.

Q. Who is the custodian of the vault?

A. Beg pardon?

Q. Who has custody of the vault?

A. Mr. John W. Custer, Chief Chemist.

Q. Is he the only one that has a key to the [219] vault?

A. No, sir; there are three of us chemists that have access to that vault.

Mr. Primock: That is all.

Mr. Thurman: That is all.

(The witness was excused.)

Mr. Thurman. Mr. Harris.

## JESSE J. HARRIS

was called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

## Direct Examination

By Mr. Thurman:

Q. Please state your name.

A. Jesse J. Harris.

Q. Mr. Harris, where do you live?

A. Phoenix.

Q. Phoenix, Arizona?

A. That is correct.

Q. How long have you lived up here?

A. Six and one-half years.

Q. And what business or profession are you in?

A. I am Public Office Manager for the Mountain States Telephone & Telegraph Company.

Q. Here in Phoenix, Arizona?

A. Yes, sir. [220]

Q. And do you have access to the records of the Telephone Office?      A. Yes, sir.

Q. What records?

A. Well, I have access to records which are long distance calls and their application to names, addresses, the record of service, amount of pay.

Q. That is your job there, is keeping track of those records, is that right?

A. Yes, sir, part of my job, yes.

Q. They are kept under your direction and control for the Telephone Company?

A. That is right.

(Testimony of Jesse J. Harris.)

Q. You were subpoenaed to bring with you the records showing in whose name Phoenix phone No. 4-3914 was listed from September, 1948, to February 15th, 1949, were you not?

A. That is right.

Q. And do you have the record of the Telephone Company portraying that? A. I do.

Q. And what does that record show?

A. That was 4-3914, wasn't it?

Q. 4-3914.

A. That record tells me it was listed in the name of Arnold Enriquez at 2022 East Moreland Street.

Q. And do you also have a record there of Phone No. 9-6327? A. I do.

Q. And for that same period of time can you tell the Court and jury in whose name that phone number was listed?

A. That was listed to Connie Duarte, non-listing, at 1030 East Moreland Street.

Q. You said "non-listing"?

A. That is as to the name.

Q. What does it mean in telephone parlance?

A. That "non-listing" means it is not listed in the directory, but you can get it by calling the information operator.

Mr. Thurman: You may cross-examine.

### Cross-Examination

By Mr. Primock:

Q. Mr. Harris, Phone No. 4-3914 in the name

(Testimony of Jesse J. Harris.)

of Arnold Enriquez, that is a listed number in the telephone book, is it not?

A. It was at that time.

Mr. Primock: That is all.

(The witness was excused).

Mr. Thurman: The Government now offers in evidence all exhibits 1 to 29 that have been marked for identification, with the exception of Exhibits 16, 3 and 23. With the exception of those three, we now offer them in evidence; that is, the narcotics,

Mr. Primock: Which three?

The Clerk: 28 and 29 are already in evidence.

Mr. Primock: Which three were not offered?

Mr. Thurman: 16, 3 and 23.

Mr. Primock: If the Court please, we object to the Exhibits 19 and 22 which refer to sales or purchases, rather, made by the man by the name of Cobos, for the reason there is no testimony that the exhibits are in the same condition as they were when they were delivered to Mr. Cobos. We object to Exhibit 4, as they were not identified by the witness Elkins. He could not identify that particular package as being the identical package that he received. We further object to all exhibits on the grounds they have not connected this defendant Arnold Enriquez in any way, shape or form, with any of the exhibits that are here, and for that reason should not be admitted.

The Court: Didn't the witness Elkins find his

initials on the wrapping on the four cans of opium?

Mr. Thurman: Your Honor, he did not. He said he could not identify them. I am talking about 4 now.

The Court: Yes.

Mr. Thurman: However, the Government's evidence shows this, that he said as soon as he got the four cans of opium that he turned them over immediately to Lorenz who was in the barn, and as he walked out, he handed them to him. Mr. Lorenz said, "These are the ones I got from Mr. Elkins at that time and place," and he found his initials on here.

The Court: All right, the objection will be overruled.

(Thereupon the documents were received as Government's Exhibits 1 to 27, inclusive, with the exception of No. 3, 16 and 23, in evidence).

Mr. Thurman: I'd like to make a correction there, Mr. Clerk, that 23—Let me be right about this now, Government's Exhibit 23 marked for identification I think should be in. I don't want to make any error, but let's check it. That is the one you testified in the Cobos matter.

Mr. Smith: That is right.

Mr. Thurman: So I would like to say, with that correction, with the exception of 16 and 3.

Mr. Primock: We would like to include our objections to 23, the same objection as was made to 19 and 22, that they were delivered to Cobos, and

he has not testified that they are in the same condition as he received it.

The Court: All right, they may be received.

(Whereupon Government's Exhibits 1 to 27, with the exception of Exhibits 3 and 16, were received in evidence).

Mr. Thurman: The Government rests.

Mr. Primock: At this time, your Honor, we would like to have the jury excused to make some motions.

The Court: All right, you may retire from the courtroom, gentlemen. Keep in mind the Court's admonition.

(Thereupon the jury was excused). [225]

#### Defendants' Case

Mr. Primock: At this time, your Honor, we would like to move for judgment of acquittal on Count 52 which charges Arnold Enriquez with knowingly and fraudulently, contrary to law, import and bring into the United States, and assist in so doing, approximately 11,229 grains of prepared smoking opium, on the grounds that there is no evidence whatsoever that this defendant did bring 11,229 grains, or any grains, into the United States.

We would like to also make a motion for judgment of acquittal on Count 53, which charges Arnold Enriquez with the transportation and concealment, after unlawful importation thereof, of ap-

proximately 11,229 grains of prepared smoking opium, on the ground there is no evidence showing that Arnold Enriquez transported or concealed any grains of opium.

We would also like to move for judgment of acquittal on Count 54, which charges Arnold Enriquez with unlawfully, fraudulently and feloniously sell, distribute and give away to one Okla W. Johnson a certain quantity of prepared smoking opium, to wit, approximately 11,229 grains of prepared smoking opium, on the grounds that the [226] testimony of Johnson himself was that this defendant was not present at the time of the sale and that he did not see him there; that there is no evidence whatsoever that this defendant Arnold Enriquez did sell or give away 11,229 grains of prepared smoking opium, or any grains.

We would like to move for judgment of acquittal on Count 64 of the indictment, which charges Arnold Enriquez with bringing into the United States and import approximately 145 grains of smoking opium, on the grounds there is no evidence before this Court whatsoever of Arnold Enriquez importing or bringing into this country any grains of opium.

We would like to make a motion for judgment of acquittal on Count 65, which charges Arnold Enriquez with concealing and transporting 145 grains of prepared smoking opium, on the grounds that there is no evidence before this Court of any



nature where Arnold Enriquez transported or concealed any grains of prepared smoking opium.

We would like to make a motion for judgment of acquittal on Count 66, which charges Arnold Enriquez with the sale, or fraudulently and feloniously sell, distribute, and give away to one Charles Cobos a certain quantity of prepared [227] smoking opium, approximately 145 grains, when all of the testimony before this Court shows that that sale was made by Joe Martinez, and Mr. Smith testified that Arnold Enriquez was not there at the time said sale was made.

We would like to make motion for judgment of acquittal on Count 67, which charges Arnold Enriquez with importing and bringing into the United States 145 grains of prepared smoking opium, on the grounds that there is no evidence whatsoever of any type before this Court that Arnold Enriquez brought into the United States any grains of prepared smoking opium.

We would like to move for judgment of acquittal on Count 68, which charges Arnold Enriquez with fraudulently receiving, conceal and facilitate the transportation of 145 grains of prepared smoking opium, on the grounds that there is no testimony whatsoever before this Court that Arnold Enriquez transported, concealed or have in his possession any amount of prepared smoking opium.

We would like to move for judgment of acquittal on Count 69 which charges Arnold Enriquez with the sale or distribution or giving away to Charles

Cobos 145 grains of prepared smoking opium, on the grounds that the evidence before this [228] Court shows that the sale was made by one Joe Martinez, and also that Mr. Smith testified that Arnold Enriquez was not present at the time any of this sale was made.

We would like to further make a motion for judgment of acquittal on Count 78, which charges Arnold Enriquez with conspiracy to import and conceal and facilitate the transportation and concealment of narcotic drugs, on the grounds that there is no evidence whatsoever here to show conspiracy or an agreement between Arnold Enriquez and the co-defendants. The only testimony before this Court has been numerous sales by the co-defendants and casual acquaintanceship or casual conversations between Arnold Enriquez and several witnesses. There has been no showing by the Government of any agreement, which is a necessary element of conspiracy, that the only evidence before this Court involving or mentioning Arnold Enriquez at all is the fact that he was approached to purchase some narcotics and he said he could not make any deliveries; that all of the evidence here shows conspiracy between all of the co-defendants except Arnold Enriquez. There has been no tie-up between Arnold Enriquez and the defendants. All of these overt acts were done on [229] the part of the co-defendants and none on the part of Arnold Enriquez, and for that reason there is no—In our opinion, there is no evidence before this Court to tie Arnold En-

riquez up on a conspiracy charge, and we ask for a motion for judgment of acquittal be granted.

Mr. Thurman: With respect to the three substantive counts of the indictment that Mr. Primock argued for the motion of dismissal——

The Court: Nine.

Mr. Thurman: Huh?

The Court: Nine, rather than three.

Mr. Thurman: Well, nine counts, yes, that is split up, that is what I meant.

The Court: Yes.

Mr. Thurman: There are the counts that Mr. Smith testified to concerning Mr. Cobos making a telephone call to the home, or making the call to Arnold Enriquez and then subsequently, Martinez would come, or someone else, with the narcotics. I think that throws Mr. Arnold Enriquez into the case very deliberately and positively under the aiding and abetting act.

The Court: Well, you don't know who they called. They called a telephone number.

Mr. Thurman: They called a telephone number and had a conversation with someone by the name of Pirata, which everybody testified was the nickname of the defendant Arnold Enriquez. That is not substantive evidence, I think the Court has it in mind, but that is the basis of their—but I think if we haven't got enough to show aiding and abetting, then, of course, it is up to the Court to do as it sees fit there, but on the conspiracy, I think

there is plenty to go to the jury on that without much argument. There is more than casual association and casual conversation; the use of that car continuously that belonged to the defendant. They met in the Club and met in his place of business. He was there with them pretty near all the time and, of course, as he told Mr. Colbert, "I am sorry I can't help you out, I would like to take care of you, but there isn't any stuff in town. Art is out of town now, has gone to bring in a load, but he will be here on Friday, but until he brings his stuff back there is no stock here." He also told that to Mr. Johnson. Again, Mr. Arturo Leyvas, I have forgotten which one it is right now, testified to the fact that Arturo told him, naming this defendant, that they were all in it. I think that is sufficient to go to the jury, your Honor. [231]

The Court: Well, there might be enough on the conspiracy count, but there certainly is not enough on the nine substantive counts, so I will grant the motion to 52, 53, 54, 64, 65, 66, 67, 68 and 69, and deny the motion as to the conspiracy count.

Call in the jury.

(Thereupon the jury returned into the courtroom and resumed their place in the jury box.)

The Court: You may proceed.

Mr. Primock: Call Arnold Enriquez.

## ARNOLD ENRIQUEZ

was called as a witness in his own behalf, and being first duly sworn, testified as follows:

## Direct Examination

By Mr. Primock:

Q. Will you state your name, please?

A. Arnold S. Enriquez.

Q. And where do you live, Arnold?

A. 2022 East Moreland.

Q. Phoenix, Arizona?

A. Phoenix, Arizona.

Q. And who do you live with?

A. My wife and five children.

Q. How long have you lived in Phoenix, Arizona? [232] All my life.

Q. You were born here?

A. I was born here, yes.

Q. Arnold, you have been convicted of a felony once, haven't you? A. Yes, sir.

Q. Arnold, do you know Arturo C. Leyvas?

A. Yes, sir.

Q. How long have you known Arturo C. Leyvas?

A. Oh, since we were kids.

Q. How many years would you say that would be? A. Oh, 20, 25 years, I guess.

Q. Do you know Ray C. Leyvas?

A. Yes, sir.

Q. How long have you known Ray C. Leyvas?

A. About the same amount of time.

Q. Do you know Connie Duarte?

A. Yes, sir.

(Testimony of Arnold Enriquez.)

Q. How long have you known Connie Duarte?

A. Well, ever since I can remember.

Q. Do you know Arturo E. Jerez, who is known as Colimo?

A. Yes, sir.

Q. How long have you known him?

A. Same amount of time, I guess.

Q. And do you know Joe Martinez? [233]

A. Yes, sir.

Q. And how long have you known Joe Martinez?

A. Oh, I'd say six or seven years.

Q. And during the period of the 16th day of February, 1948, and the 16th day of February, 1949, did you see all of these people?

A. Yes, sir.

Q. And how often would you see them?

A. Oh, I imagine pretty near every day or so.

Q. What business or occupation were you in during the period of that year?

A. '48?

Q. Between February, 1948, and February, 1949.

A. Well, I just run them camp grounds or that property on Sixteenth.

Q. What camp grounds and property is that?

A. That is the Corona Courts at 1602 East Washington.

Q. You own that property?

A. Me and the Finance Company.

Q. And you manage the operations of it?

A. Yes, sir.

Q. Will you tell the jury just what type of businesses are located on that piece of property?

A. Well, there is about 21 camp grounds or



(Testimony of Arnold Enriquez.)

courts—cottages, I guess you would call it, and [234] there is a store building where there is a saloon or a bar, and there is a restaurant on the side, that is about all.

Q. Were you operating the bar or the restaurant?      A. No, sir.

Q. Did you have it leased?

A. Yes, sir.

Q. And who did you lease the restaurant to?

A. To a man by the name of Pablo Basquez.

Q. And did you operate the bar?

A. No, sir.

Q. Who did you have that leased to?

A. Well, the period in '48 it was leased to the Pan-American Club.

Q. And did they have it all during this period of February, '48 to February, '49?

A. No, I don't think so. I think they only—the Pan-American Club was only there about five months.

Q. And do you recall what five months of that year they were there?

A. Oh, I'd say they were the first six months of that year at that time.

Q. And subsequent to them, who had the lease on the premises? [235]

A. Well, after they closed up I rented it to Nacho Pacheco.

Q. And did he have it in January, '49?

A. Yes, sir.



(Testimony of Arnold Enriquez.)

Q. What type of license did he have in there, if you know?

A. He had a No. 7 license, wine and beer.

Q. And how much rent were you receiving?

A. \$225 a month.

Q. Did you have any interest in the license or the operation of the place of business?

A. No, sir.

Q. Did you have any interest or anything to say in the management of the little restaurant next door to the bar?

A. No, sir.

Q. Now, Arnold, I will ask you whether or not on the 16th of February, 1948, whether or not you knew that Arturo E. Jerez imported and brought into the United States approximately 160 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you whether or not, on the 16th day of February, 1948, whether or not you knew whether Arturo E. Jerez transported and concealed 160 grains of prepared smoking opium? [236]

A. No, sir.

Q. I will ask you, Arnold, whether or not on the 16th day of February, 1948, you knew that Arturo E. Jerez sold to one Viron E. Elkins approximately 160 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you, Arnold, whether or not on the 28th day of February, 1948, if you knew that Arturo E. Jerez imported into the United States 517 grains of prepared smoking opium?

A. No, sir.

(Testimony of Arnold Enriquez.)

Q. I will ask you, Arnold, whether or not, on the 28th day of February, 1948, you knew that Arturo E. Jerez transported and concealed 517 grains of prepared smoking opium? A. No, sir.

Q. I will ask you, Arnold, whether or not on the 28th day of February, 1948, that you knew that Arturo E. Jerez sold to Viron A. Elkins 517 grains of prepared smoking opium? A. No, sir.

Q. I will ask you, Arnold, whether or not on the 1st day of May, 1948, you knew that Arturo E. Jerez imported into the United States 517 grains of prepared smoking opium? A. No, sir.

Q. I will ask you, Arnold, whether or not, on the 1st day of May, 1948, you knew that Arturo E. Jerez transported and concealed 517 grains of prepared smoking opium?

A. No, sir. [237]

Q. I will ask you, Arnold, whether or not on the 1st day of May, 1948, you knew that the defendant Arturo E. Jerez sold to Viron A. Elkins 517 grains of prepared smoking opium? A. No, sir.

Q. I will ask you, Arnold, if you know—if you did know that on the 22d day of July, 1948, that Arturo E. Jerez imported and brought into the United States 14,583 grains of prepared smoking opium? A. No, sir.

Q. I will ask you, Arnold, if you know that on the 22d day of July, 1948, that Arturo E. Jerez concealed and transported 14,583 grains of prepared smoking opium? A. No, sir.

Q. I will ask you, Arnold, if you know that on the 22nd day of July, 1948, that Arturo E. Jerez

(Testimony of Arnold Enriquez.)

sold to one Viron A. Elkins 14,583 grains of prepared smoking opium?      A. No, sir. [238]

Q. I will ask you, Arnold, if on the 19th day of August, 1948, you knew that Arturo E. Jerez imported and brought into the United States 14,583 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you, Arnold, if you know that on or about the 19th day of August, 1948, Arturo E. Jerez did conceal and transport 14,583 grains of prepared smoking opium?      A. No, sir.

Q. I will ask you, Arnold, whether or not you knew, on the 19th day of August, 1948, that Arturo E. Jerez did sell to one Viron A. Elkins 14,583 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you, Arnold, whether or not you knew, on October 3d, 1948, that Arturo E. Jerez did import and bring into the United States 693 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you, Arnold, if you knew that on the 3rd day of October, 1948, that Arturo E. Jerez did sell to one Okla Johnson 693 grains of prepared smoking opium?      A. No, sir.

Q. I will ask you whether or not you knew, Arnold, that on the 10th day of October, 1948, that Arturo E. Jerez did import into the United States 351 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you, Arnold, if you knew that on

(Testimony of Arnold Enriquez.)

the 10th day of October, 1948, that Arturo E. Jerez did conceal and transport 351 grains of prepared smoking opium?      A. No, sir.

Q. I will ask you, Arnold, if you knew that on the 10th day of October, 1948, that Arturo E. Jerez did sell to one Okla Johnson 351 grains of prepared smoking opium?      A. No, sir.

Q. I will ask you if you knew that on the 29th of October, 1948, that Arturo E. Jerez did bring into the United States 2447 grains of prepared smoking opium?      A. No, sir.

Q. I will ask you if you know that on the 29th day of October, 1948, that Arturo C. Leyvas did conceal and transport 2447 grains of prepared smoking opium?      A. No, sir.

Q. I will ask you if you know that on the 29th day of October, 1948, that Arturo C. Leyvas did sell to one Frank W. Colbert 2447 grains of prepared smoking opium?      A. No, sir.

Q. I will ask you if you know on the 5th day of November, 1948, that Arturo C. Leyvas had imported into the United States 10,192 grains of prepared smoking opium?      A. No, sir.

Q. I will ask you, Arnold, if you know that the defendant Arturo C. Leyvas did transport and conceal 10,192 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you, Arnold, if you know that on the 5th day of November, 1948, Arturo C. Leyvas did sell to one Okla W. Johnson 10,192 grains of prepared smoking opium?      A. No, sir.

(Testimony of Arnold Enriquez.)

Q. I will ask you, Arnold, if, on or about the 11th day of November, 1948, you know that Connie Duarte imported into the United States 15-3/4 grains of a morphine derivative, namely, heroin?

A. No, sir.

Q. I will ask you, Arnold, if you know that Connie Duarte, on the 11th day of November, 1948, did transport and conceal 15 $\frac{3}{4}$  grains of a morphine derivative, namely, heroin?

A. No, sir.

Q. I will ask you, Arnold, if you know that on the 11th day of November, 1948, that the defendant, Connie Duarte, did sell to one, Frank W. Colbert, 15 $\frac{3}{4}$  grains of heroin.

A. No, sir.

Q. I will ask you, Arnold, if you know that on the 14th day of November, 1948, that Connie Duarte did import into the United States 118 grains of a morphine derivative, namely, heroin?

A. No, sir.

Q. I will ask you, Arnold, if you know that on or about the 14th day of November, 1948, that Connie Duarte did conceal and transport 118 grains of a morphine derivative, namely, heroin?

A. No, sir.

Q. I will ask you, Arnold, if you know that on or about the 14th day of November, 1948, Connie Duarte did sell 118 grains of heroin to one, Okla W. Johnson?

A. No, sir. [242]

Q. I will ask you, Arnold, if you know that on or about the 17th day of November, 1948, that Arturo C. Leyvas and Connie Duarte did import and

(Testimony of Arnold Enriquez.)

bring into the United States 381 grains of a morphine derivative, namely, heroin?      A. No, sir.

Q. I will ask you, Arnold, if you know that on or about the 17th day of November, 1948, that Arturo C. Leyvas and Connie Duarte did conceal and transport 381 grains of a morphine derivative, namely, heroin?      A. No, sir.

Q. I will ask you, Arnold, whether or not you knew—Strike that. I will ask you, Arnold, if you knew that on the 17th day of November, 1948, Arturo C. Leyvas and Connie Duarte did sell to one, Okla W. Johnson, 381 grains of heroin?

A. No, sir.

Q. And I will ask you, Arnold, if you know that on the 16th day of December, 1948, that Arturo C. Leyvas did import and bring into the United States 2½ grains of an opium derivative, namely, morphine hydrochloride?      A. No, sir.

Q. I will ask you, Arnold, if you know that on the 16th day of December, 1948, that Arturo C. [243] Leyvas did conceal and transport 2½ grains of an opium derivative, namely, morphine hydrochloride?      A. No, sir.

Q. I will ask you, Arnold, if you know that on the 16th day of December, 1948, that the defendant Arturo C. Leyvas did sell to one Viron A. Elkins 2½ grains of morphine hydrochloride?

A. No, sir.

Q. I will ask you if you knew, Arnold, on the 16th day of December, 1948, Arturo C. Leyvas did bring and import into the United States 378 grains



(Testimony of Arnold Enriquez.)

of a morphine derivative, namely, heroin hydrochloride?      A. No, sir.

Q. I will ask you, Arnold, whether you know that on the 16th day of December, 1948, that Arturo C. Leyvas did transport and conceal 378 grains of a morphine derivative, namely, heroin?

A. No, sir.

Q. I will ask you, Arnold, if you knew that on the 16th day of December, 1948, that the defendant Arturo C. Leyvas did sell to one Viron A. Elkins 378 grains of heroin hydrochloride?

A. No, sir.

Q. I will ask you if you know, Arnold, that [244] on the 8th day of January, 1949, that the defendant Joe Martinez did import into the United States 179 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you, Arnold, if you knew that on the 8th day of January, 1949, that Joe Martinez did transport and conceal 179 grains of prepared smoking opium?      A. No, sir.

Q. I will ask you, Arnold, if you know that on the 8th day of January, 1949, that Joe Martinez did sell to one Charles Cobos 179 grains of prepared smoking opium?      A. No, sir.

Q. I will ask you, Arnold, if you knew that on the 14th day of January, 1949, that Arturo C. Leyvas did import into the United States 5¼ grains of an opium derivative, namely, morphine hydrochloride?      A. No, sir.

Q. I will also ask you, Arnold, whether you



(Testimony of Arnold Enriquez.)

know that on the 14th day of January, 1949, that Arturo C. Leyvas did conceal and transport  $5\frac{1}{4}$  grains of an opium derivative, namely, morphine hydrochloride? A. No, sir. [245]

Q. I will ask you, Arnold, if you know that on the 14th day of January, 1949, Arturo C. Leyvas did sell to one Viron A. Elkins  $5\frac{1}{4}$  grains of morphine hydrochloride? A. No, sir.

Q. I will ask you, Arnold, if you knew that on the 14th day of January, 1949, Arturo C. Leyvas did import and bring into the United States 235 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you, Arnold, if you knew that on the 14th day of January, 1949, Arturo C. Leyvas did conceal and transport 235 grains of prepared smoking opium? A. No, sir.

Q. I will ask you, Arnold, if you know that on the 14th day of January, 1949, Arturo C. Leyvas did sell to one Viron A. Elkins 235 grains of prepared smoking opium? A. No, sir.

Q. I will ask you, Arnold, if you knew Arturo C. Leyvas and Arturo Jerez did import and bring into the United States approximately 11,229 grains of prepared smoking opium? A. No, sir.

Q. I will ask you if you knew whether or not Arturo C. Leyvas and Arthur Jerez brought 11,229 grains of prepared smoking opium into the United States? A. No, sir.

Q. I will ask you, Arnold, if you and Arturo C. Leyvas and Arturo Jerez did transport and conceal

(Testimony of Arnold Enriquez.)

11,229 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you whether or not you knew that Arturo C. Leyvas and Arturo Jerez transported and concealed 11,229 grains of prepared smoking opium? A. No, sir.

Q. I will ask you, Arnold, whether or not you and Arturo C. Leyvas and Arturo Jerez did sell to one Okla W. Johnson 11,229 grains of prepared smoking opium? A. No, sir.

Q. I will ask you whether or not you knew that on the 14th day of January, 1949, that Arturo C. Leyvas and Arturo Jerez did sell to one Okla W. Johnson 11,229 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you, Arnold, if you know that on the 15th day of January, 1949, that Joe Martinez did import into the United States 235 grains of prepared smoking opium? [247]

A. No, sir.

Q. I will ask you, Arnold, if you knew that on the 15th day of January, 1949, that Joe Martinez did transport and conceal 235 grains of prepared smoking opium? A. No, sir.

Q. I will ask you, Arnold, if you know that Joe Martinez, on the 15th day of January, 1949, sold to one Charlie Cobos 235 grains of prepared smoking opium? A. No, sir.

Q. I will ask you, Arnold, if, on the 29th day

(Testimony of Arnold Enriquez.)

of January, 1949, you knew that Joe Martinez, on that date, did import and bring into the United States 2625 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you, Arnold, if you knew that on the 29th day of January, 1949, that Joe Martinez did transport and conceal 2625 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you, Arnold, if you knew that on the 29th day of January, 1949, that Joe Martinez did sell to one Okla W. Johnson 2625 grains of prepared smoking opium?

A. No, sir. [248]

Q. I will ask you, Arnold, if you knew that on the 2d day of February, 1949, Connie Duarte did import and bring into the United States 287 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you, Arnold, if you knew that on the 2d day of February, 1949, that Connie Duarte did transport and conceal 287 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you, Arnold, if you knew that on the 2d day of February, 1949, that Connie Duarte did sell to one Viron A. Elkins, 287 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you, Arnold, if you and Joe Martinez did, on the 6th day of February, 1949, import and bring into the United States approximately 145 grains of prepared smoking opium.

A. We did not.

Q. I will ask you if you know that Joe Martinez brought into the United States 145 grains of pre-

(Testimony of Arnold Enriquez.)

pared smoking opium?           A. No, sir.

Q. I will ask you, Arnold, if you and Joe Martinez did, on the 6th day of February, 1949, [249] conceal and transport 145 grains of prepared smoking opium?           A. No, sir.

Q. I will ask you, Arnold, whether or not you know that Joe Martinez did conceal and transport 145 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you, Arnold, if you and Joe Martinez did, on the 6th day of February, 1949, sell to one Charles Cobos 145 grains of prepared smoking opium?           A. No, sir.

Q. I will ask you, Arnold, whether or not you know that Joe Martinez did on the 6th day of February, 1949, sell to one Charles Cobos 145 grains of prepared smoking opium?           A. No, sir.

Q. I will ask you, Arnold, whether or not you know—whether you, Arturo C. Leyvas and Joe Martinez did bring into the United States, on the 8th day of February, 1949, 145 grains of prepared smoking opium?           A. No, sir.

Q. I will ask you, Arnold, whether or not you brought in 145 grains of prepared smoking opium on the 8th day of February, 1949. [250]

A. No, sir.

Q. I will ask you, Arnold, whether or not Arturo C. Leyvas and Joe Martinez did, of your own knowledge, bring into the United States on the 8th day of February, 1949, 145 grains of prepared smoking opium?

(Testimony of Arnold Enriquez.)

A. Not to my knowledge, no, sir.

Q. I will ask you, Arnold, whether or not on the 8th day of February, 1949, that you, Arturo C. Leyvas and Joe Martinez did transport and conceal 145 grains of prepared smoking opium?

A. No, sir.

Q. I will ask you whether or not you, Arnold Enriquez, transported or concealed 145 grains of prepared smoking opium? A. No, sir.

Q. I will ask you whether or not Arturo C. Leyvas and Joe Martinez, of your own knowledge, did transport and conceal 145 grains of prepared smoking opium?

A. Not to my knowledge, no, sir.

Q. I will ask you whether or not, on the 8th day of February, 1949, if you, Arturo C. Leyvas and Joe Martinez did sell to Charles Cobos 145 grains of prepared smoking opium?

A. No, sir. [251]

Q. I will ask you, Arnold, whether or not you did, on the 8th day of February, 1949, sell to one Charles Cobos 145 grains of prepared smoking opium? A. No, sir.

Q. I will ask you whether or not, to your own knowledge, Arturo C. Leyvas and/or Joe Martinez did sell to one, Charles Cobos, 145 grains of prepared smoking opium?

A. Not to my knowledge, no, sir.

Q. I will ask you whether or not you knew, on the 8th day of February, 1949, that Arturo C. Leyvas did bring and import into the United States

(Testimony of Arnold Enriquez.)

approximately 188 grains of prepared smoking opium?      A. No, sir.

Q. I will ask you whether or not, on the 8th day of February, 1949, you know that Arturo C. Leyvas did conceal and transport 188 grains of prepared smoking opium?      A. No, sir.

Q. I will ask you whether or not you knew that on the 8th day of February, 1949, Arturo C. Leyvas did sell to one Viron A. Elkins 188 grains of prepared smoking opium?      A. No, sir.

Q. I will ask you further, Arnold, if you know that on the 8th day of February, 1949, Connie [252] Duarte did import and bring into the United States  $1\frac{3}{4}$  grains of a morphine derivative, namely, heroin hydrochloride?      A. No, sir.

Q. I will ask you, Arnold, that if you knew that on the 14th day of February, 1949, that Connie Duarte did transport and conceal  $1\frac{3}{4}$  grains of a morphine derivative, namely, heroin hydrochloride?      A. No, sir.

Q. I will ask you whether or not, on the 14th day of February, 1949, that you knew that Connie Duarte did sell to one Viron A. Elkins  $1\frac{3}{4}$  grains of heroin hydrochloride?      A. No, sir.

Q. I will ask you if you know that on the 15th day of February, 1949, that Ray C. Leyvas did import and bring into the United States approximately 24 grains of prepared smoking opium and approximately 15 grains of an opium derivative, namely, yen shee?      A. No, sir.



(Testimony of Arnold Enriquez.)

Q. I will ask you, Arnold, that if you knew on the 15th day of February, 1949, that Ray C. Leyvas did transport and conceal 24 grains of prepared smoking opium and approximately 15 grains of an opium derivative, namely, yen shee? [253]

A. No, sir.

Q. Now, I want to ask you, Arnold, whether or not you, Arturo C. Leyvas, Ray Leyvas, Connie Duarte, Arturo E. Jerez and Joe Martinez did agree amongst yourselves, or with each other, for the purposes of importing narcotics, transporting narcotics, and the sale of narcotics?

A. No, sir.

Q. I will ask you whether or not you knew that Arturo Jerez offered to sell Viron Elkins prepared smoking opium?

A. No, sir.

Q. Do you know Viron A. Elkins?

A. No. I know him now, but I didn't know him then.

Q. Prior to the time of your arrest, had you ever seen Viron Elkins, to your knowledge?

A. No, sir; not to my knowledge.

Q. Did you have a conversation with Viron A. Elkins about anything whatsoever?

A. No, sir.

Q. You heard all the testimony this morning concerning the sales that were made to Viron A. Elkins by all of the other people mentioned, Art Leyvas and Ray Leyvas, Connie Duarte, and Joe Martinez.



(Testimony of Arnold Enriquez.)

Were you present at any of the times that [254] such sale was discussed or that such sale was consummated?      A. No, never.

Q. Did you of your own knowledge know that any such sales were made?      A. No, sir.

Q. You heard all of the testimony concerning the sales made to Okla W. Johnson?

A. Yes, sir.

Q. You heard that in court yesterday and today?

A. Yes, sir.

Q. Were you present at any time when there was any discussion concerning such sales to Okla W. Johnson?      A. No, sir.

Q. Were you present in any conversation, or at the time that the said sales were consummated to Okla W. Johnson?      A. No, sir.

Q. Did you know Okla W. Johnson?

A. Well, I met him during that period when the Club was going.

Q. Did Okla W. Johnson, did you make any sales at all to Okla W. Johnson?      A. No, sir.

Q. I believe I asked you whether or not [255] you knew whether any sales had been made to Okla W. Johnson?      A. You did ask me.

Q. What was your answer?

A. I didn't know.

Q. I will ask you whether or not you know Frank Colbert?      A. Yes, I know him.

Q. How long have you known Frank Colbert?

A. Well, the first time I ever met him was in '44.

(Testimony of Arnold Enriquez.)

Q. Now, you heard Frank Colbert testify today, did you not? A. Yes, sir.

Q. Did you see him at the prize fights on January 12th, 1949? A. Yes, sir.

Q. Did you have any conversations with him?

A. Well, if you would call it a conversation, I guess so.

Q. You and he speak to each other?

A. Yes.

Q. Was anyone else present besides you and he?

A. No.

Q. Will you relate to the Court and jury just exactly what took place at that time on [256] January 12th, 1949?

A. Well, Joe Martinez and myself went to these fights, and during the fights, oh, I don't know which fight was going on, it was preliminaries, Frank Colbert came up to me where I was sitting and said he wanted to talk to me, so I told him I'd see him after the fights, so after the fights, as we were going out the door he called me to the side and we went across a car that was parked there at the curb, and he asked me if I could get him any stuff, or any opium. I told him that I didn't know anything about it. Well, he said he was sick and he needed some opium for himself and another friend of his, and I said I didn't know anything about it, so he told me that he was waiting for Art and that Art would take care of him, so I told him to see Art. "Well," he says, "When is Art coming back?" I said, "I

(Testimony of Arnold Enriquez.)

don't know, a couple or three days," and I left, and that is all the conversation I had with him.

Q. Well, do you recall the day following this conversation with Mr. Colbert, which would be January 13th, 1949, you recall a conversation between you and Mr. Johnson? A. Yes, sir.

Q. And where did that conversation take [257] place?

A. That took place at the Club there, at Pacheco's Inn, or Pirata's Inn, whatever the name.

Q. What was the name of it in January, '49?

A. I think it was—left the same name, I think it was Pirata's Star Bar.

Q. Was anybody else present at that time?

A. The bartender, Mr. Pacheco.

Q. What time of day or night was this?

A. Well, it was in the afternoon. I don't remember exactly the time it was, but it was in the afternoon.

Q. Will you relate to the Court and jury exactly what that conversation was?

A. Sure. As I remember, Joe Martinez and myself walked in the Club, and this fellow Johnson was sitting at the bar, so we came in, and he was drinking a bottle of beer and eating a hard boiled egg, so I sat right next to him, I guess, or a couple of stools from him, or one stool, and he said, "Hello," so I said, "Hello," and I ordered a bottle of beer and an egg, and so did Mr. Pacheco, he was there all the time with us, and nobody else in the

(Testimony of Arnold Enriquez.)

club at the time, so we were talking about the sign, or something, I forget what we were talking about, and as we paid Mr. Pacheco and he went to ring up the money, Mr. [258] Johnson asked me if I could get him some stuff. I told him I didn't know anything about it. "Well," he said, "Art is supposed to take care of me." I said, "You see Arturo." He said, "Where is he?" I said, "I don't know, I think he is out of town, I heard he was," so he said, "Well," he said, "Couldn't you do me any good at all?" I said, "No, I don't know anything about it," so about that time Mr. Pacheco was coming back and we started talking about something else, and that is all that was said.

Q. What kind of a car did you own during this period, Mr. Enriquez?

A. It was a Cadillac, '42 Cadillac.

Q. What color was that?

A. Well, it was blue one time, and it was green, the last time it was green.

Q. It was both colors during this period?

A. Yes. First it was blue and then it was green.

Q. Did you ever loan your car to anybody?

A. Most of the time Joe Martinez had it.

Q. And why did Joe Martinez have it?

A. Well, at the time he was managing the Club.

Q. Which club?

A. Mine, Pirata's Star Club.

Q. And after you closed up your club, who [259] would use the automobile?

(Testimony of Arnold Enriquez.)

A. Joe would. He still had it.

Q. Did you ever loan your automobile to anybody other than Joe Martinez?

A. Oh, I lent it to, I don't know, I'd say, I don't know how many, everybody used it.

Q. Well, would you name to the Court and jury some other people that you loaned the automobile to?

A. Well, Joe had it most of the time. I let this fellow Colimo have it once in a while. He used to borrow it from me, and this fellow Murphy, of the Police Department, he is a Detective, he went to Frisco, National Park. You went to Tucson, or some place with it. Duke Burke, he used it.

Q. All of these times you have related, was that during the period of February, '48 and February, '49?

A. Yes. In fact, Joe Martinez had my car day and night, and Mr. Smith, he knows that he did, because he followed him around and followed me around when I was not in it. He knew who had it most of the times.

Q. Now, Mr. Enriquez, you were present this morning when Mr. Mike Sandoval testified, were you not?

A. Yes, sir. [260]

Q. Did you see him on the 26th day of December, 1948, at the home of Ray Leyvas?

A. I guess I did.

Q. He testified that Ray, Art, "Colimo" were smoking opium. Did you walk in and see them?

(Testimony of Arnold Enriquez.)

A. No, sir.

Q. I will ask you whether or not, on the 26th of December, 1948, you smoked any opium?

A. No, sir.

Q. You heard him further testify that a day or two after that you went over to the Coast?

A. That is right.

Q. And who went with you?

A. Well, there was Art and this fellow Colimo and this Mike, myself, and a fellow by the name of Manuel Gomez.

Q. And what was the purpose in going to the Coast?

A. We were going to the fights in Los Angeles.

Q. Do you remember the name of the fights?

A. If I am not mistaken, I think it was Bollanos and Ike Williams.

Q. You are an ardent fight fan, are you not?

A. I go every week, yes.

Q. You go in Phoenix every week?

A. Yes. [261]

Q. You make trips out of town to see good fights?

A. Yes, sir.

Q. I will ask you whether or not on this trip over to the Coast to see this fight, whether or not anything was discussed concerning the importation, transportation, concealment or sale of narcotics of any type?

A. No, sir we didn't talk anything about narcotics.



(Testimony of Arnold Enriquez.)

Q. Whose car did you go in to the Coast?

A. In my own Cadillac.

Q. That is the green Cadillac? A. Yes.

Q. Is your telephone number 4-3914?

A. That is right.

Q. Is that listed in the telephone book?

A. It has always been listed.

Q. How long have you had that telephone number?

A. Oh, I guess since '41 or '42, whenever I bought that house.

Q. Have you ever seen any of these exhibits here prior to the time of coming into court?

A. No, sir.

Q. Did you know whether or not any of these exhibits were in the possession of the people [262] that the witnesses have testified about?

A. No, sir.

Q. The first time you saw them was yesterday and today? A. Yes, sir.

Q. Have you ever been by the mattress factory of Art Leyvas?

A. Have I ever been by there, been there?

Q. Yes. A. Yes.

Q. Where is it located?

A. 1501 East Adams.

Q. Would you say you were by there often?

A. Oh, yes, I was there pretty often.

Q. Did you ever see Elkins at the mattress factory? A. No, sir.



(Testimony of Arnold Enriquez.)

Q. Were you ever at Elkins' home at Tempe?

A. No, sir.

Q. Do you know Robert Lorenz?

A. Yes, I know him now.

Q. Did you know him during the period of February, '48 to February, '49?

A. Well, I don't exactly remember when I met him, but it was in the latter part of '48, I think.

Q. Do you know Charlie Cobos? [263]

A. Yes, sir.

Q. How long have you known Charlie Cobos?

A. I know him since '44, I guess.

Q. Did you ever sell any narcotics to Charlie Cobos? A. No, sir.

Q. Now, directing your attention, Arnold, to the night that you were arrested; it was the early morning of February 15th?

A. Well, I think it was.

Q. Where were you just prior to being arrested?

A. Well, that night we had been to the show or some place, and we come back to Connie's at 1030 East Moreland, oh, I'd say around 11:00 o'clock—10:30 or 11:00 o'clock, and we sat there playing cards until about 1:30, or something like that, so Mike and Joe Martinez and myself thought we would go down to Dick's and get a sandwich.

Q. Who is Mike? A. Sandoval.

Q. The witness that testified here?

A. Yes, sir.

(Testimony of Arnold Enriquez.)

Q. And you and he and Joe Martinez were going to go where?

A. We got in the car, drove over to Dick's, [264] on Eleventh Street—Well, it would be on Fourteenth Street and McDowell.

Q. And did you eat your sandwich.

A. Yes.

Q. Then what happened?

A. Well, we got out of Dick's and got in the car and drove to Eleventh Street. We drove west on McDowell and as we turned on Eleventh Street, Mr. Lorenz and three or four more agents come up to the side of me and told me to stop the car, and so I did.

Q. Then what happened?

A. And Mr. Lorenz and the other agents got off and they made us get off and they searched us, so, I forget who they took, Mike or they took Joe with them in their car, and some of them went in my car, and they drove off. We drove up on Van Buren to 24th or 26th Street to some camp grounds up there where Mr. Bump and Agent Simpson, I forget who else was there. There was about 15 there or 20, I don't know.

Q. During the period of February, 1948, and February, '49, did you at any time have any narcotics of any type, kind or description in your possession?

A. No, sir. [265]

Q. Do you know of any sales of any narcotics during that time?

A. No, sir.

Mr. Primock: That is all. You may examine.

(Testimony of Arnold Enriquez.)

Cross-Examination

By Mr. Thurman:

Q. When you were arrested at—You had 3201 Mexican pesos? A. When I was what?

Q. Arrested on the 15th of February.

A. No, sir.

Q. You didn't. A. No, sir.

Q. How many times have you been arrested?

Mr. Primock: I object to that.

The Court: Yes, the objection is sustained.

Mr. Thurman: I mean pertaining to the time you were arrested here in this case. A. Yes.

Q. How much Mexican money did you have on you?

A. I didn't have no Mexican money that night.

Q. No Mexican pesos at all? A. No, sir.

Q. And in addition to that you had \$197.85, [266] didn't you?

A. That is right, something like that.

Q. And didn't Mr. Bump check the money you had on you after you were arrested?

A. Yes, sir; Mr. Smith, he did, or somebody did.

Q. Huh?

A. Mr. Bump or Mr. Smith, or somebody there. There was about 15 there. They all checked it.

Q. You say you got \$225 a month for the lease on this property? A. I still get it.

Q. What else do you do besides receiving rent from the Inn?

A. I get \$100 a month on the restaurant, I get

(Testimony of Arnold Enriquez.)

about eight dollars from the cabins each week.

Q. So your net income from that business is approximately \$1000 a month? A. Yes.

Q. That is net, if you understand what I mean by "net"?

A. Yes, that is \$1000 a month gross.

Q. Clear?

A. No, it is not clear, it is gross.

Q. It is gross? A. Gross, yes.

Q. Now, during the period of this particular case, you were at the Club and at the premises pretty near continuously, weren't you?

A. No, I wouldn't say that.

Q. You weren't? A. No, sir.

Q. Wasn't Joe Martinez Secretary of the Club?

A. He was managing the Club. He was President—He was President of the Pan-American Club.

Q. Huh?

A. He was President of the Pan-American Club.

Q. President of the Pan-American Club?

A. Yes, sir.

Q. And a very close friend of yours?

A. Yes, sir.

Q. And he was there all the time, wasn't he?

A. Well, he lived upstairs.

Q. He lived upstairs. A. Yes, sir.

Q. And Colimo was also—Mr. Jerez, he was there all the time too, wasn't he?

A. No, I wouldn't say he was.

Q. How do you know he was not there all the time?

(Testimony of Arnold Enriquez.)

A. Well, because I met him a lot of places besides there.

Q. You were around with him quite a bit?

A. No, I wouldn't say that.

Q. You were around with Joe Martinez [268] quite a bit?

A. Well, I go around with him to the fights, probably, see him at the fights.

Q. You testified on direct examination he followed you around?

A. Who followed me around?

Q. Joe Martinez.

A. I didn't; I didn't say any such thing.

Q. He had your car most of the time?

A. That is right.

Q. Jerez would have it too, didn't he?

A. No, I only let Colimo have it probably once or twice.

Q. And you mean to tell the Court and jury that you knew nothing of the activities of this man Jerez and this man Martinez with respect to the sale of narcotics?

A. No, I didn't know anything about it, no.

Q. Now, when you had this conversation with Mr. Okla Johnson at the bar, at the time when you had the beer and the egg and he also had a beer and an egg, I believe, you said there was a bartender there by the name of Pacheco, is that right?

A. That is correct.

Q. When you were discussing this fact situation

(Testimony of Arnold Enriquez.)

with Johnson, the bartender went down to [269] ring up the change, is that right?

A. That is right.

Q. The money, or whatever it was?

A. That is right.

Q. How far did he go from where you were to where the cash register was?

A. About from here to where you are sitting.

Q. And at that time when Johnson said to you, "I have got to get some stuff to keep my people satisfied," you told him at that time and place that Arturo Levayas was on the Coast and he would be back and he would see that he got fixed up, or words to that effect, did you not?

A. No, sir; he didn't even talk about that. He didn't use them words at all.

Q. And again, Mr. Colbert, at the time that he met you at the fights, that story that he told this Court and jury is something that never happened, isn't that correct. In other words, you never told him that Art was on the Coast and as soon as Art got back he would fix him up, you never said that, or anything like that?

A. No, I might have said something not like that. I told him I didn't have anything to do with Art, to see him, it wasn't any of my business.

Q. Now, when you left—What day did [270] you leave to go to the Coast with Arturo and this other bunch of boys?

A. Well, I don't remember the exact date.

Q. You left on the 25th of February, didn't you,

(Testimony of Arnold Enriquez.)

and you were driving your Cadillac car, and in that car was Arturo Leyvas and Jerez?

A. That is right.

Q. And this boy Sandoval that testified in this case? A. Yes, sir, and Gomez, yes.

Q. And another boy named Gomez?

A. Yes.

Q. You were on your way to Tijuana, weren't you? A. No, sir.

Q. Did you get to the fights? A. No.

Q. When did you first meet this man Okla Johnson, did you say?

A. Oh, I don't exactly remember what the day was, but it was during that time when that Club was in force, that Pan-American Club.

Q. You were a member of the Club, weren't you?

A. Yes, sir.

Q. And did you know Okla Johnson's business?

A. No, sir.

Q. Now, I want to show you Government's [271] Exhibit 23, 22 and 19. This is Government's Exhibit 23 in evidence. I want you to look at it. Did you ever see that exhibit before? A. No, sir.

Q. Isn't that the stuff that you sold to Mr. Cobos? A. No, sir.

Q. Are you positive about that?

A. Positive.

Q. Handing you Government's Exhibit 22 for identification. I want you to take a look at it and examine it and see if you have seen that before?



(Testimony of Arnold Enriquez.)

A. No, sir.

Q. Well, you are looking at it now.

A. I see it now.

Q. I want you to be sure you see it now.

A. I see it now.

Q. And this is also an exhibit that you sold to Mr. Cobos in which you and Joe Martinez delivered it to him, didn't you?

A. No, sir.

Q. I show you Government's Exhibit 19 in evidence. Take a look at that exhibit, please. Have you ever seen that before?

A. No, sir. I do now.

Q. You never saw this before? [272]

A. No, sir.

Q. In fact, this is the same opium, smoking opium, that you sold to Charlie Cobos, is it not?

A. I never sold opium to nobody.

Q. Never? A. Never.

Q. Do you know where Charlie Cobos is now?

A. No, sir.

Mr. Thurman: That is all.

Mr. Primock: That is all.

(The witness was excused.)

The Court: We will have our afternoon recess at this time. Keep in mind the Court's admonition.

(A brief recess was taken, after which, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Mr. Primock: Call Ed Marshall.

## ED MARSHALL

was called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

## Direct Examination

By Mr. Primock:

Q. Will you state your name, please?

A. Ed Marshall.

Q. And what is your occupation? [273]

A. Chief Investigator for the Department of Liquor Licenses and Control, State of Arizona.

Q. And in that capacity, do you handle the records of all the liquor licenses for the County of Maricopa, State of Arizona. A. I do.

Q. You are here under subpoena, are you not?

A. I am.

Q. And did you bring with you the records pertaining to the liquor license of Nacho Pacheco?

A. The name is Y. M. Pacheco.

Q. What is the name?

A. Y. M. Pacheco.

Q. Do you have this with you? A. I do.

Mr. Primock: Mark this.

Mr. Thurman: Never mind marking it.

Mr. Primock: You will stipulate?

Mr. Thurman: The liquor representative brought it here, he is qualified to be okay.

Q. (By Mr. Primock): Will you look at these records and tell the jury the period of time that the liquor license with the name of Y. M. Pacheco located at 1602 East Washington Street, City of Phoenix, Arizona, was in effect?

(Testimony of Ed Marshall.)

A. On November 26, 1948, we received [274] what we call a place to place application transferring Series 7 Beer and Wine License No. 1901 East Madison Street to 1602 East Washington Street. This application was posted and it was granted to that location on December 9th, 1948.

Q. And when was it transferred out of that location?

A. On August 22nd, 1949, the application was filed with the State Department of Liquor Licenses and Control to transfer from Y. M. Pacheco to Patrick Caramenta, which is a person to person transfer. That means the license remains at the same location under different ownership, which was granted on September 7th, 1949.

Mr. Primock: That is all. You may cross-examine.

### Cross-Examination

By Mr. Thurman:

Q. 1602 East Washington Street, is that what Pirata's Inn is?

A. That was Pirata's Inn.

Q. Now, prior to November 26th, 1948, in whose name was this particular beverage license in?

A. I will have to testify from memory.

Q. If you know; if you know, that is all right.

A. I know that there was a license there at [275] one time, but as to dates, I can't give you the exact date or exact year.

Q. Well, say, during the year 1945, was it not a

(Testimony of Ed Marshall.)

fact that the beer or wine, whatever license it was for liquor at 1602 East Washington Street was in the name of Arnold Enriquez?

Mr. Primock: Just a minute. I am going to object to that as being too remote, and immaterial.

The Court: I don't see what that would have to do with it.

Mr. Thurman: What is that? I don't understand.

The Court: Well, what is the purpose of it?

Mr. Thurman: Well, I want to show that he had the Inn at one time and there was a certain thing happened and then he got rid of it.

The Court: Well, all right, go ahead.

A. At one time Arnold Enriquez did have a license at 1602 East Washington. It was a Series 6 license permitting the sale of all liquors.

Q. And during the year '45, he had it transferred, didn't he?

A. As I said, he had it transferred, but from memory I am not going to try to say——

Q. Did you have any knowledge; didn't you hear about him having been convicted of handling narcotics? [276]

Mr. Primock: I am going to object to that and move that it be stricken.

The Court: Well, he is refreshing his memory, possibly.

Q. (By Mr. Thurman): Do you remember that incident?

Mr. Primock: We will further object to it on the ground it is hearsay, your Honor, he heard something.

(Testimony of Ed Marshall.)

Mr. Thurman: I am trying to fix the record, what the conviction is, already in, which is not prejudicial to the defendant.

The Court: All right.

Q. (By Mr. Thurman): Do you remember that incident?

A. I remember the incident of Arnold Enriquez being arrested and subsequently the license was transferred.

Q. And that is due to the fact, was it not, that a person who has been convicted of a felony, can they have a license?

A. Not for a period of two years.

Mr. Thurman: Not for a period of two years. That is all.

Mr. Primock: That is all.

(The witness was excused.)

Mr. Primock: The defense rests, your Honor. At this time we would like to reurge our [277] motion made at the close of the case of the United States of America.

The Court: Motion is denied. Do you have any rebuttal?

Mr. Thurman: No, your Honor.

The Court: All right. Let's see, it is ten minutes of 4:00 now. Well, we will suspend until 10:00 in the morning, gentlemen. Keep in mind the Court's admonition.

(Thereupon a recess was taken at 3:50 o'clock of the same day.) [278]

April 28, 1950.

### COURT'S INSTRUCTIONS

All parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: You may proceed.

(Whereupon closing arguments were presented to the jury by counsel for both sides, after which the court instructed the jury as follows:)

The Court: It now becomes the Court's duty, gentlemen, to instruct you as to the law that applies to this case.

You will be permitted to take the indictment to the jury room with you. You will probably notice that it contains 78 counts. I think that is correct—yes, 78 counts. However, the count upon which the defendant is on trial is the last, the 78th. He is charged with the other defendants; that is, Arturo Leyvas, Ray C. Leyvas, Connie Duarte, Arturo E. Jerez and Joe Martinez, with the crime of conspiracy.

Now, "conspiracy" is merely an agreement, but I will give you the definition from the Code in a moment. That is all it means. It means an agreement to commit an offense. For example, if A and B should decide and agree they were going to kill C, they go out and buy a pistol to [279] accomplish that purpose, then they are guilty of a conspiracy. Of course, should they go ahead and shoot C and kill him, they will be guilty of murder, but when they



entered into that unlawful agreement to do this overt act and buy the pistol, then they are guilty of conspiracy.

Now, this Count 78 charges as follows:

“That in the month of February, 1948, and continuing thereafter until on or about the 16th day of February, 1949, in the County of Maricopa, Arizona, and within the District of Arizona, and at other places to the Grand Jurors unknown, the said defendants, Arturo C. Leyvas, Arnold Enriquez, Ray C. Leyvas, Connie Duarte, Arturo E. Jerez and Joe Martinez, the identical persons named as defendants in one or more of the above and foregoing 76 counts of this indictment, and in this count hereinafter referred to as the conspirators, did wilfully, knowingly, and feloniously conspire, combine, confederate and agree between themselves and each other, and other persons to the Grand Jurors unknown, to commit the divers offenses charged against said defendants in the first 76 counts of this indictment preceding this count, and made offenses by Title 21 U.S.C.A. 174.” [280]

Now, Title 21 U.S.C.A. 174 reads as follows: This is one of the offenses they were charged in conspiring to commit:

“If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assist in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any



such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such persons shall upon conviction be punished as the act provides," and

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Now, as I say, they were charged with conspiring to commit the offenses I have just read, and also Section 2554(a) of Title 26, which reads as follows:

"It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs [281] mentioned in Section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary."

The drugs mentioned in 2550(a) are as follows:

"There shall be levied, assessed, collected, and paid upon opium, isonipecaine, coca leaves, opiate, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on the aforesaid drugs."

Now, Paragraph 2 of Count 78 reads as follows:

“That the object of said conspiracy was knowingly, unlawfully, wilfully and fraudulently, in said District of Arizona, to import and bring into the United States, and cause to be imported and brought into the United States, prepared smoking opium, morphine hydrochloride, an opium derivative, heroin hydrochloride, a morphine derivative, and yen shee, an opium derivative, [282] and to wilfully and fraudulently receive, conceal and facilitate the transportation and concealment, after the unlawful importation thereof, of the above named narcotic drugs; and further, to unlawfully, fraudulently and feloniously sell, distribute and give away to divers persons, certain quantities of the said narcotic drugs, not in pursuance of written orders from the transferees to the said conspirators, on forms issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by virtue of Title 26 U.S.C.A., 2554(a); that in furtherance of said conspiracy and to effect the object thereof, the said conspirators did, among others, commit the following overt acts, to wit:

That is in connection with what I told you about A and B conspiring to kill C. They entered into an agreement and went out and bought a pistol. The buying of the pistol is an overt act.

The overt acts set out in this count are as follows:

“(a) That at the time and place as alleged in each of the first 77 counts of this indictment, each of the said conspirators committed the offense charged

against said conspirators in each of said counts, in the manner charged therein, the [283] allegations concerning which in said counts are hereby incorporated by reference thereto in this count as fully and with like effect, for all purposes, as though the same were here reiterated and repeated.

“(b) That on or about February 15, 1948, at Tempe, Arizona, the conspirator, Arturo Jerez, offered to sell one Viron A. Elkins prepared smoking opium.

“(c) That on or about December 15, 1948, at Phoenix, Arizona, conspirator Ray Leyvas had a conversation with one Viron A. Elkins.

“(d) That on or about December 15, 1948, at Phoenix, Arizona, Conspirator Ray Leyvas told one Viron A. Elkins that he thought he could get the said Viron A. Elkins an ounce of heroin.

“(e) That on or about the 16th day of December, 1948, at Tempe, Arizona, the conspirator Ray Leyvas informed the said Viron A. Elkins that he would bring the heroin to him about 5:30 p.m. that day.

“(f) That on or about the 16th day of December, 1948, at Tempe, Arizona, Conspirator Ray Leyvas, in company with Conspirators Connie Duarte and Arturo C. Leyvas, introduced the said Arturo C. Leyvas to the said Viron A. Elkins as [284] his brother.

“(g) That on or about the 16th day of Decem-

ber, 1948, at Tempe, Arizona, Conspirator Arturo C. Leyvas delivered to the said Viron A. Elkins a capsule containing white powder.

“(h) That on or about January 8, 1949, at Phoenix, Arizona, Conspirator Arnold Enriquez told one Charles Cobos that he would deliver to him a small jar of smoking opium for the price of \$50.”

There wasn't any evidence of that that I remember. I read that inadvertently. Disregard that.

“(j) That on or about January 12, 1949, at Phoenix, Arizona, Conspirator Arnold Enriquez told one Frank W. Colbert that ‘I would like to take care of you but there isn't any stuff in town. Art is out of town now to bring in a load, and he will be here on Friday, but until he comes back there is no stuff here.’ ”

Now, as I have mentioned, the law under which the indictment in this case is drawn provides that if two or more persons conspire to commit any offense against the United States, and one or more of them does any act to effect the object of the conspiracy, each of the parties to such [285] conspiracy is guilty.

In order to establish the crime charged it is necessary, first, that the conspiracy or agreement to commit the particular offenses against the United States as alleged in the indictment be established, and secondly, to prove further that one or more of the parties engaging in the conspiracy has committed some act to effect the object thereof.

To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an express or formal agreement for the unlawful venture or scheme, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design.

In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a [286] member of the conspiracy. The success or failure of the conspiracy is immaterial, but before the defendant may be found guilty of the charge it must appear beyond a reasonable doubt that a conspiracy was formed as alleged in the indictment, and that the defendant was an active party thereto.

In order to warrant you in finding a verdict of guilty against the defendant, it is necessary that you be satisfied beyond a reasonable doubt that a conspiracy as charged in the indictment was entered into between two or more of the defendants to violate the law of the United States in the manner described in the indictment. It is necessary further that, in addition to the showing of the unlawful

conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid.

Under the charge made the conspiracy constitutes the offense, and it must be made to appear from the evidence, beyond a reasonable doubt, before the defendant can be convicted, and that the defendant was a party to the conspiracy and [287] unlawful agreement charged, and that he continued to be such up to the time that overt acts were committed, if the evidence shows that there were any such. The mere fact that the defendant may have engaged in the performance of any of the acts charged in the indictment as overt acts, would not authorize a conviction by reason of that fact alone, but it is necessary to show that such defendant was a party to the conspiracy and unlawful agreement before his guilt of the offense charged is made out.

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of



a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a [288] new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the lawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to a concerted plan and in furtherance of the common object, is considered the act and declaration of all of the conspirators and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators can be considered only as against the person doing such acts or making such statements. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration. [289]

The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any other essential fact, it is not only necessary that all the



circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. That is, you are to consider all of the circumstances and conditions shown in evidence, and if it appears to you as reasonable men that, even though there is no direct evidence of the actual participation in the alleged offense by the defendant, a reasonable inference from all of the facts and circumstances does to your minds, beyond a reasonable doubt, show that the defendant was a party to the conspiracy as charged, then you should make the deduction and find accordingly.

It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things which he did, but if the defendant, with knowledge that the law was designed to be violated in the particular manner charged in the indictment, aided in any way by affirmative action in the accomplishment of the unlawful act, he would be guilty. To this statement there is one [290] exception, and that is, if before any overt act has been committed on the part of any conspirator or at his suggestion or with his aid or participation, any such conspirator withdraws from the conspiracy and wholly disassociates himself from the project or the carrying out thereof, he ceases to be a conspirator and is without guilt.

Now, evidence of a former conviction of the defendant for a similar offense was introduced in evidence. This was for a very limited purpose. How-

ever, I will read you an instruction in connection with that.

The fact that the accused may have committed an offense at some time is not evidence that at a later time the accused committed the offense charged in the indictment, even though both offenses be of a like nature. Evidence as to an alleged earlier offense of a like nature may not therefore be considered in determining whether the accused did the acts charged in the indictment. Nor may such evidence be considered for any other purpose, unless the jury first finds that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the acts charged in the indictment.

If the jury should find from the other evidence in [291] the case that the accused did the acts charged in the indictment, then the jury may consider evidence as to an alleged earlier offense in determining the state of mind or intent with which the accused did the acts charged in the indictment. And, where all the elements of an alleged earlier offense of a like nature are established by evidence which is clear and conclusive, the jury may draw therefrom the inference that in doing the acts charged in the indictment, the accused acted wilfully, and not because of mistake or inadvertence or other innocent reason.

Now, by the finding of an indictment no presumption whatsoever arises to indicate that a defendant is guilty, or that he has had any connection with, or responsibility for, the act charged against him.

A defendant is presumed to be innocent at all stages of the proceeding until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction. A reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a [292] moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs.

Reasonable doubt is not a mere possible or imaginary doubt or a bare conjecture; for it is difficult to prove a thing to an absolute certainty.

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you. Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions that are given to you.

In judging of the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain

verdict when, were it not for such a feeling or bias, you would reach a contrary conclusion. And, whenever, after a careful consideration of [293] all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity or his motives; or by contradictory evidence. In judging the credibility of the witness in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or the defendant, the manner in which he might be affected by the [294] verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching

any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

The defendant has offered himself as a witness and has testified in the case. Having done so, you are to estimate and determine his credibility in the same way as you would consider the testimony of any other witness. It is proper to consider all the matters that have been suggested to you in that connection, including the interest that the defendant may have in the case, his hopes and his fears, and what he had to gain or lose as a result of your verdict. You are not limited in your consideration of the evidence to the bald expressions of the witnesses; you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men.

There is nothing peculiarly different in the [295] way a jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains



the Government is entitled to a verdict. Jurors are expected to agree upon a verdict where they can conscientiously do so; you are expected to consult with one another in the jury room and any juror should not hesitate to abandon his own view when convinced that it is erroneous. In determining what your verdict shall be you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out, must be wholly left out of account and disregarded. The opinion of the judge as to the guilt or innocence of a defendant, if directly or inferentially expressed in these instructions, or at any [296] time during the trial, is not binding upon the jury. For to the jury exclusively belongs the duty of determining the facts. The law you must accept from the Court as correctly declared in these instructions.

Anything occur to you gentlemen that I have overlooked?

Mr. Thurman: I think of nothing, your Honor.

The Court: After you retire to your jury room you will select one of your number to act as foreman and proceed with your deliberations. After you have agreed upon a verdict, in the event you do so agree, you will have the verdict signed by your foreman and returned into open court. Any verdict agreed upon, you understand, must be the unanimous verdict of the jury.

A form has been provided for your guidance which reads, in part, as follows:

“We, the jury, duly empaneled and sworn in

the above-entitled action, upon our oaths do find the defendant Arnold Enriquez, blank, as charged in Count 78 of the indictment.”

You will insert in that blank whatever your finding may be, either guilty or not guilty.

You will retire now in the custody of the bailiff.

(Thereupon, the jury retired from the courtroom at 11:36 a.m. of the same day to proceed with their deliberations.) [298]

I hereby certify that the proceedings had upon the trial of the within entitled cause are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 297 typewritten pages constitute a full, true and accurate transcript of said shorthand record.

/s/ LOUIS L. BILLAR,  
Official Reporter.

[Endorsed]: Filed July 6, 1950.

---

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO  
RECORD ON APPEAL

I, Willaim H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records,



papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, vs. Arnold Enriquez, Defendant, numbered C-8658 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that said original documents, and said copies of the minute entries, constitute the record on appeal in said case as designated in the Appellant's Designation filed therein and made a part of the record attached hereto (excepting Government's Exhibits 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 which consist of narcotic drugs), and the same are as follows, to wit:

1. Indictment, filed June 16, 1949.
2. Minute entry of November 21, 1949, (arraignment, plea and setting).
3. Minute entry of December 19, 1949, (resetting of trial).
4. Minute entry of April 26, 1950, (proceedings of trial).
5. Minute entry of April 27, 1950, (further proceedings of trial).

6. Minute entry of April 28, 1950, (further proceedings of trial).

7. Verdict, filed April 28, 1950.

8. Government's Exhibit No. 28, filed April 26, 1950.

9. Government's Exhibit No. 29, filed April 27, 1950.

10. Defendant's Motion for New Trial, filed May 1, 1950.

11. Defendant's Motion for Judgment of Acquittal, filed May 1, 1950.

12. Minute entry of May 8, 1950.

13. Minute entry of May 15, 1950, (order denying motions; imposition of sentence).

14. Judgment and Commitment, filed and docketed May 15, 1950.

15. Judgment of Acquittal, filed and docketed May 15, 1950.

16. Minute entry of May 15, 1950, order denying bail pending appeal.

17. Defendant's Notice of Appeal, filed May 15, 1950.

18. Defendant's Election Not to Commence Serving Sentence, filed May 15, 1950.

19. Order of Court of Appeals Granting Motion for Admission to Bail Pending Appeal, filed May 24, 1950.

20. Minute entry of May 24, 1950, (order approving bail bond pending appeal).

21. Bail Bond Pending Appeal, filed May 24, 1950.

22. Minute entry of May 29, 1950, (order extending time to file record).

23. Reporter's Transcript, filed July 6, 1950.

24. Statement of Points on Which Appellant Intends to Rely on Appeal, filed July 27, 1950.

25. Appellant's Designation of Record on Appeal, filed July 27, 1950.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$6.40 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and seal this 2nd day of August, 1950.

[Seal]      /s/ WM. H. LOVELESS,  
Clerk.

---

[Endorsed]: No. 12553. United States Court of Appeals for the Ninth Circuit. Arnold Enriquez, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona. Filed August 4, 1950.

            /s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

United States Court of Appeals,  
Ninth Circuit

No. 12553

ARNOLD ENRIQUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH AP-  
PELLANT INTENDS TO RELY ON AP-  
PEAL

I.

There was no substantial evidence to support the verdict of guilty. The lower court erred in denying appellant's motion for judgment of acquittal on Count 78 made at conclusion of the Government's case, renewed after both parties rested and again renewed after the verdict; and the court erred in denying the motion for a new trial; and erred in entering judgment against appellant on Count 78; for there was no evidence to show that appellant was a member of a conspiracy to receive, conceal, transport or import narcotic drugs; nor any evidence that he was a member of a conspiracy to agree to sell or distribute narcotic drugs not in pursuance of written orders on forms issued by the Secretary of the Treasury, as charged in the indictment.

## II.

The court erred in admitting into evidence, in spite of timely objection by appellant, Government's Exhibit 29, which was a record of a prior conviction of appellant. The exhibit could not have been used to impeach appellant and was not relevant to establish guilty intent.

## III.

The court erred in permitting the Government witness, Earl Smith, to testify over timely objection to telephone conversations made by an individual not in the presence of this appellant or any co-defendant who was not at the trial and not available for cross-examination. The evidence was hearsay and was prejudicial to appellant.

## IV.

The court erred in admitting in evidence, over timely objection, Government's Exhibits 4 and 8. These exhibits were purportedly narcotics. The witnesses could not identify the exhibits as they could not find their initials which they stated they placed upon the exhibits.

## V.

The Court erred in admitting, over timely objection by the appellant, Government's Exhibits 19, 22 and 23 which purported to be narcotics. These exhibits were purported narcotics delivered by co-defendant Martinez to Chas. Cobos. Mr. Cobos was not present in court to testify that these were the same exhibits he received from Martinez.

VI.

The court erred in admitting, over timely objections by appellant, Government's Exhibits 1 through 23 which purported to be narcotics. That this appellant was never linked to any of these exhibits and the Government failed to prove that the appellant was a member of the conspiracy as charged.

VII.

The court erred in admitting, over timely objection by the appellant, Government Exhibit 28 which purported to be a copy of a Certificate of Title and Registration of a Motor Vehicle, for the reason that the court refused to permit appellant to question the witness on voir dire; that said exhibit was not the best evidence; that said exhibit was not properly certified.

/s/ PAUL H. PRIMOCK,

Attorney for Appellant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed August 15, 1950.

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[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

To: The Clerk of the above-entitled Court, the United States of America, and Frank E. Flynn, Attorney for Appellee:

The appellant, Arnold Enriquez, hereby designates the following portions of the records and

proceedings of evidence to be contained in the record on appeal, to wit:

1. The Indictment.
2. The Verdict.
3. Motion for judgment of acquittal.
4. Judgment.
5. Judgment of Acquittal on Counts 52, 53, 54, 64, 65, 66, 67, 68 and 69.
6. Reporter's Transcript of Evidence.
7. All Exhibits.
8. All minute entries and orders pertaining to the above-named Appellant.
9. Motion for New Trial.
10. Notice of Appeal.
11. Election not to Commence Serving Sentence.
12. Order Granting Motion for Admission to Bail Pending Appeal.
13. Statement of Points Upon Which Appellant Intends to Rely on Appeal.
14. This Designation.

Dated this 14th day of August, 1950.

/s/ PAUL H. PRIMOCK,  
Attorney for Appellant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed August 15, 1950.



No. 12,553

IN THE

United States  
Court of Appeals

For the Ninth Circuit

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ARNOLD ENRIQUEZ,

*Appellant,*

VS.

UNITED STATES OF AMERICA

*Appellee.*

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APPELLANT'S OPENING BRIEF

Appeal from the United States District Court  
District of Arizona.

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PAUL H. PRIMOCK, Esquire,  
Security Building,  
Phoenix, Arizona

SHUTE & ELSING

By W. T. ELSING

Title and Trust Building  
Phoenix, Arizona

*Attorneys for Appellant*



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No. 12553

IN THE

United States  
Court of Appeals

For the Ninth Circuit

---

ARNOLD ENRIQUEZ,

*Appellant,*

VS.

UNITED STATES OF AMERICA

*Appellee.*

---

**APPELLANT'S OPENING BRIEF**

Appeal from the United States District Court  
District of Arizona.

---

**JURISDICTIONAL MATTERS**

On April 28, 1950 in the United States District Court for the District of Arizona the appellant, Arnold Enriquez, was found guilty of conspiring to violate certain laws relating to narcotics (T.R. 46). On May 1, 1950 he moved for a Judgment of Acquittal on the ground of insufficiency of evidence (the motion being equivalent to one for a directed verdict) and a motion for a new trial (T.R. 47-49). On May 15, 1950 the court denied the motions and ad-



judged the appellant guilty as charged in Count 78 of the Indictment (T.R. 52). On the same day a Notice of Appeal was filed (T.R. 55).

The District Court had jurisdiction under 18 U.S.C. Section 3231. This Court has jurisdiction under 28 U.S.C. Section 1291.

### STATEMENT OF FACTS

A grand jury returned an indictment against appellant and five others (T.R. 2).<sup>1</sup> In addition to Count 78 stating a conspiracy in violation of 18 U.S.C. (1946 Ed.) Sec. 88 and 18 U.S.C. Sec. 371,<sup>2</sup> 77 counts charged objective offenses in violation of 21 U.S.C. Sec. 174<sup>3</sup> and 26 U.S.C. Sec.

---

(1) Arturo C. Leyvas, Ray C. Leyvas, Connie Duarte, Arturo E. Jerez, and Joe Martinez.

(2) 18 U.S.C. (1946 Ed.), Sec. 88 reads: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000.00, or imprisoned not more than two years, or both."

18 U.S.C. Sec. 371 reads: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

The government charged but one conspiracy; hence appellant could not have been found guilty of violating both the old and the new statute. But he was.

(3) 21 U.S.C. Sec. 174 reads: "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such

2554 (a)<sup>4</sup>. Of these substantive counts, nine relate specifically to the appellant<sup>5</sup> (T.R. 2).

Appellant's codefendants pleaded guilty (T.R. 38, 61). Appellant was tried; and at the close of the government's case, the Court entered a judgment of acquittal on all the substantive counts (see note (5)). It denied a motion for judgment of acquittal on the conspiracy count (T.R. 255).<sup>6</sup>

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person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

(4) 26 U.S.C. Sec. 2554(a) reads: "It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary."

(5) Counts 52, 53, 54, 64, 65, 66, 67, 68 and 69.

(6) The conspiracy count (T.R. 33), omitting the overt acts which the court either did not read to the jury or told the jury to disregard because the judge concluded that the evidence did not establish them (T.R. 297), reads:

County Seventy-Eight

(18 U.S.C.A. 88 (1946 Ed.) and 18 U.S.C.A. 371)

"1. That in the month of February, 1948, and continuing thereafter until on or about the 16th day of February, 1949, in the County of Maricopa, Arizona, and within the District of Arizona, and at other places to the Grand Jurors unknown, the said defendants, Arturo C. Leyvas, Arnold Enriquez, Ray C. Leyvas, Connie Duarte, Arturo E. Jerez and Joe Martinez, the identical persons named as defendants in one or more of the above and foregoing seventy-seven counts of this indictment, and in this count hereinafter referred to as the conspirators, did wilfully, knowingly and feloniously conspire, combine, confederate and agree between themselves, and each other, and other persons to the Grand Jurors unknown, to commit the diverse offenses charged against said defendants in the first seventy-seven counts of this indictment preceding this count, and made offenses by Title 18 U.S.C.A. 174 and Title 26 U.S.C.A. 2554(a), the allegations of which seventy-seven

On the close of the evidence, the case was submitted to a jury. It returned a verdict of guilty upon which judgment was entered (T.R. 46, 52). Hence this appeal.

Viewing the evidence in a light most favorable to the government, the facts are these:

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counts of this indictment are incorporated in this count by reference as fully as if they were herein repeated.

"2. That the object of said conspiracy was knowingly, unlawfully, wilfully and fraudulently, in said District of Arizona, to import and bring into the United States, and cause to be imported and brought into the United States, prepared smoking opium, morphine hydrochloride (an opium derivative), heroin hydrochloride (a morphine derivative) and yen shee (an opium derivative), and to wilfully and fraudulently receive, conceal and facilitate the transportation and concealment, after the unlawful importation thereof, of the above-named narcotic drugs; and further, to unlawfully, fraudulently and feloniously sell, distribute and give away to diverse persons, certain quantities of the said narcotic drugs, not in pursuance of written orders from the transferees to the said conspirators, on forms issued in blank for that purpose by the Secretary of the Treasury of the United States as required by virtue of Title 26 U.S.C.A. 2554(a); that in furtherance of said conspiracy and to effect the object thereof, the said conspirators did, among others, commit the following overt acts, to wit:

(a) That at the time and place as alleged in each of the first seventy-seven counts of this indictment, each of the said conspirators committed the offense charged against said conspirators in each of said counts, in the manner charged therein, the allegations concerning which in said counts are hereby incorporated by reference thereto in this count as fully and with like effect, for all purposes, as though the same were here reiterated and repeated.

(b) That on or about February 15, 1948, at Tempe, Arizona, the conspirator, Arturo Jerez, offered to sell one Viron A. Elkins prepared smoking opium.

(c) That on or about December 15, 1948, at Phoenix, Arizona, conspirator Ray Leyvas had a conversation with one Viron A. Elkins.

(d) That on or about December 15, 1948, at Phoenix, Arizona, conspirator Ray Leyvas told one Viron A. Elkins that he thought he could get the said Viron A. Elkins an ounce of heroin.

(e) That on or about the 16th day of December, 1948, at Tempe, Arizona, the conspirator Ray Leyvas informed the said Viron A. Elkins that he would bring the heroin to him about 5:30 p.m. that day.

(f) That on or about the 16th day of December, 1948, at Tempe, Arizona, conspirator Ray Leyvas, in company with conspirators

From February, 1948 to February, 1949 in Phoenix and Tempe, Arizona, government undercover agents and government informers made purchases of narcotics from the alleged coconspirators of the appellant. There were twenty-three distinct transactions (T.R. 82, 94, 107, 110, 116, 118, 121, 123, 126, 143, 148, 152, 154, 155, 162, 170, 183 and 213). The appellant was not present at any of the negotiations and there was no direct evidence that he had anything to do with sales, concealment, transportation or any other act condemned by the applicable statutes (T.R. 136, 189, 190, 191, 215, 235 and 236). At least seven government agents (T.R. 97, 119, 126, 219, 281) and three informers (T.R. 78, 216, 226) worked actively in the field for over a year attempting to implicate appellant (e.g., T.R. 192, 194). Aside from a monetary incentive, they used the fact of friendship and the purported fact of illness (e.g. T.R. 274) in their unsuccessful attempt to induce appellant to sell or facilitate the sale of narcotics. The only positive, direct evidence in the record relating to appellant is that he was having nothing to do with drugs. Disregarding his testimony at the trial when he emphatically denied the charges made against him (T.R. 259 et seq.), the government conceded that during its investigation, appellant consistently told even those who he believed were his friends that he did not deal in the "stuff" (e.g. T.R. 194).

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Connie Duarte and Arturo C. Leyvas, introduced the said Arturo C. Leyvas to the said Viron A. Elkins as his brother.

(g) That on or about the 16th day of December, 1948, at Tempe, Arizona, conspirator Arturo C. Leyvas delivered to the said Viron A. Elkins a capsule containing white powder.

\* \* \* \* \*

(j) That on or about January 12, 1949, at Phoenix, Arizona, conspirator Arnold Enriquez told one Frank W. Colbert that 'I would like to take care of you but there isn't any stuff in town. Art is out of town now to bring in a load and he will be here on Friday but until he comes back there is no stuff here.' "

There was not an iota of evidence to support the nine substantive counts of the indictment which were directed against appellant. The evidence on the conspiracy count was all circumstantial; and the judge of the lower court, obviously in doubt (T.R. 255) and feeling that the evidence "might" be sufficient to sustain a verdict of guilty, let the jury have the case (T.R. 292).

Support for the government's case comes from the following enumerated elements.

First: *Guilt by association*. The appellant was friendly toward his guilty codefendants; he had known them for some length of time; and was seen in their company on various occasions (T.R. 256). (Appellant's occupation is that of an operator of a court consisting of twenty-one cottages which he owns (T.R. 257). He also owns property which is leased for a bar, property leased for a restaurant (T.R. 258) and property which had been leased for the use of a social club—the Pan-American Democratic Club (T.R. 140), referred to at times in the transcript as Pirata's Club).

Second: *Guilt because others wrongfully used property*. A Cadillac automobile owned by the appellant (T.R. 104) was on one occasion—July 22, 1948—used by the defendant Arturo E. Jerez to deliver opium to the government informer Elkins (T.R. 99); and on one occasion—January 15, 1949—it was used by the defendant Joe Martinez to deliver opium to a government informer, Cobos (T.R. 227). (However, the appellant loaned this car to numerous persons (T.R. 277), and defendant Joe Martinez used it most of the time when he was the manager of Pirata's Club (T.R. 276). There is no evidence whatsoever that



appellant had any knowledge that the automobile was used to effectuate any illegal transaction).<sup>7</sup>

Third: *Guilt because of knowledge that another is committing a crime.* A government agent testified that he met appellant at the Pan-American Club and told appellant that he had to get some "stuff" right away; that appellant said: "There isn't anything in town, and you will not be able to get anything until Art [Leyvas] gets back \* \* \* I'd like to help you, but there isn't anything I can do until the stuff gets here \* \* \* I know that Art is going to be back tomorrow night \* \* \* I will see that Art meets you right here" (T.R. 173, 174). The next day, according to the witness, Art saw him and said: "Arnold told me to contact you" (T.R. 176). And in behalf of the prosecution, a drug addict—Colbert—who was paid by the government for his testimony (T.R. 218) related that he asked appellant for some opium and appellant replied "that there was nothing in town, that Art would be back Friday \* \* \* and I would have to wait until he got back" (T.R. 217).

(These two witnesses had ingratiated themselves with appellant (see, generally, T.R. 216 and Johnson's testimony, T.R. 147 et seq.). Assuming that appellant knew that "Art" was obtaining opium, if appellant were "conspiring" he was doing so with government agents—not his codefendants as will be demonstrated below.)

Fourth: *Guilt by conjecture.* A government agent, Earl A. Smith, testified that on two occasions he saw another

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(7) A casual reading of the Reporter's Transcript gives the false impression that appellant's car was used constantly to carry out the object of the alleged conspiracy. Witnesses referred to the "Cadillac" by name 27 times and in many instances referred to "Enriquez' car." The fact is that covering a period of a year, it was connected with narcotic traffic only twice.

government agent, Cobos, dial the telephone number listed in appellant's name. Following the two calls defendant Joe Martinez met Cobos. Cobos turned over to agent Smith some opium (T.R. 226-229). Smith further testified that on a third occasion, agent Cobos dialed appellant's number, talked in Spanish, hung up, dialed the unlisted number of defendant Connie Duarte, mentioned "Pirata" several times; and defendant Joe Martinez came to the Cobos' house (T.R. 230, 231). The agent who allegedly made these calls did not testify at the trial.

There is no evidence that Cobos talked on the telephone with appellant; there is no evidence that any telephone conversations related to narcotics or related to any of the objects of the alleged conspiracy; there is no evidence that there was any relationship between the calls and the delivery of opium. In fact there is no evidence that any of the defendants delivered any narcotics to Cobos.

Fifth: *Guilt by a prior conviction.* Over strenuous objection (T.R. 239), prior to the time the appellant took the stand, the Court admitted in evidence a certified copy of a judgment showing that on March 5, 1945 appellant had been adjudged guilty of violating 21 U.S.C. Sec. 174 and 26 U.S.C. Sec. 2553 (T.R. 240).<sup>8 9</sup>

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(8)

Government's Exhibit No. 29

In the United States District Court for  
the District of Arizona  
No. C-10038-Tucson

United States of America,

Plaintiff,

vs.

Arnold S. Enriquez,

Defendant.

Due proceedings having been had on the Indictment filed herein presented against the defendant above-named charging a violation



## THE ISSUES INVOLVED

There are three issues which are set forth in the Specification of Errors. (1) Is the evidence sufficient to sustain

of Title 21, United States Code, section 174 and Title 26, United States Code, section 2553 as charged in counts 2 and 3 thereof.

It Is Ordered, Adjudged and Decreed that said defendant is guilty of said crime and in punishment thereof that said defendant be committed to the custody of the Attorney General of the United States or his duly authorized representative for imprisonment in such place of confinement as the said Attorney General shall designate for a term of two (2) years and six (6) months on each of said counts 2 and 3, said terms of imprisonment to run concurrently with each other and that said defendant be fined in the sum of \$1,000.00 on count 2 and in the sum of \$500.00 on count 3, and that in default of payment of said fines he stand committed until the same are paid or he is otherwise discharged by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and committment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Dated at Tucson, Arizona, March 5, 1945.

/s/ ALBERT M. SAMES,  
Judge.

A True Copy. Certified this 5th day of March, 1945.

EDWARD W. SCRUGGS,  
Clerk.

JEAN E. MICHAEL,  
Deputy.

(Endorsed) : Filed March 5, 1945.

(9) On this point, the court instructed the jury as follows:

"Now, evidence of a former conviction of the defendant for a similar offense was introduced in evidence. This was for a very limited purpose. However, I will read you an instruction in connection with that.

"The fact that the accused may have committed an offense at some time is not evidence that at a later time the accused committed the offense charged in the indictment, even though both offenses be of a like nature. Evidence as to an alleged earlier offense of a like nature may not therefore be considered in determining whether the accused did the acts charged in the indictment. Nor may such evidence be considered for any other purpose, unless the jury first finds that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the acts charged in the indictment.

"If the jury should find from the other evidence in the case that the accused did the acts charged in the indictment, then the jury may consider evidence as to an alleged earlier offense in determin-

the verdict? This was raised by the motions for judgment of acquittal and new trial (T.R. 47, 48, 250 et seq.). (2) Was it error for the court to admit into evidence the record of the prior conviction? This was raised by proper objection. (3) Was it error for the court to permit one government agent to testify that he saw another government agent (who was not present at the trial) dial certain telephone numbers and say certain things on the telephone?

### **SPECIFICATIONS OF ERROR**

#### **I.**

The lower court erred in refusing to grant appellant's motion for judgment of acquittal on Count 78; erred in denying appellant's motion for a new trial; and erred in entering judgment on the verdict; for the evidence was insufficient to sustain the conviction.

#### **II.**

The lower court erred in admitting into evidence government's exhibit No. 29 which is a certified copy of a judgment of the prior conviction of appellant, dated March 5, 1945, based on an indictment charging him with violation of laws relating to narcotics (T.R. 240). Appellant objected to its introduction on the grounds that it was "improper and immaterial; incompetent. It goes to the offenses which are not in issue at this time. It goes to impeach the defendant who has not at this time taken the

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ing the state of mind or intent with which the accused did the acts charged in the indictment. And, where all the elements of an alleged earlier offense of a like nature are established by evidence which is clear and conclusive, the jury may draw therefrom the inference that in doing the acts charged in the indictment, the accused acted wilfully, and not because of mistake or inadvertence or other innocent reason."

witness stand” and it was too remote to be admissible on the question of intent (T.R. 239).

### III.

The Court erred in denying appellant’s motion to strike the testimony of the government witness to the effect that he heard a government informer, after dialing appellant’s telephone number, “talk to someone which he called ‘Pirata’ [appellant] in Spanish” (T.R. 228).

Appellant’s counsel objected by saying “I move that be stricken as hearsay” (T.R. 228).

The Court also erred in permitting the same government witness to testify that on another occasion he saw the government informer dial appellant’s number, speak in Spanish, hang up, dial the number of one of the other defendants, and heard the informer say, “Let me speak to Pirata”. “He [government’s informer] then carried on a conversation in Spanish which the name ‘Pirata’ was mentioned several times, and then hang up.” (T.R. 230). Appellant’s counsel raised the point by “I object to what he said as being hearsay” (T.R. 230).

The government informer did not testify at the trial.

## ARGUMENT

### **The Facts Are Not Sufficient to Support the Verdict**

#### I.

*The lower court erred in refusing to grant appellant’s motion for judgment of acquittal on Count 78; erred in denying appellant’s motion for a new trial; and erred in entering judgment on the verdict; for the evidence was insufficient to sustain the conviction.*

Are the facts sufficient to sustain the verdict? It is respectfully submitted that they are not.

There is no evidence, direct or circumstantial, showing that the appellant entered into an agreement, express or

implied, with his alleged coconspirators. There is no evidence of his joining in a common design to violate laws relating to narcotics. There is no evidence that appellant had any interest in the other defendants' unlawful enterprise.

Consider the elements making up the government's case.

**A. MERE ASSOCIATION WITH ALLEGED COCONSPIRATORS DOES NOT ESTABLISH GUILT.**

The appellant knew the codefendants (T.R. 256, 257). He sometimes would be seen with one or another of them at the Pan-American Club, playing poker (T.R. 142), going to prize fights (T.R. 281), enjoying a glass of beer (T.R. 173). His contacts with the codefendants were always in the open. There were no secretive meetings, no undercover gatherings. As the Court said in *United States v. Di Re* (1948), 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210,<sup>10</sup>

“Presumptions of guilt are not lightly to be indulged from mere meetings.”

Casual and unexplained meetings do not establish knowledge of a conspiracy. *United States v. Falcone* (1940), 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128.

And in *Dennert v. United States* (6th Cir. 1945), 147 F. 2d, 286, it is said:

“Nor was there any proof that he [appellant] conspired. It may not be inferred from casual and unexplained meetings between Dennert and other persons charged, that he participated or even knew of the conspiracy \* \* \* ‘Circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt \* \* \* A conviction resting on them alone cannot stand.’ ”

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(10) There were two dissents.

In *Sugarman v. United States* (9th Cir. 1929), 35 F2d 663, appellant Williams was found guilty with others of conspiring to violate certain laws relating to intoxicating liquors. At the time of his arrest he gave a fictitious name; pants which were found in a boat used to import liquor matched a coat he was wearing and he was seen in the company of the alleged co-conspirators. In reversing, this court said:

The appellant "was referred to on different occasions as one of the parties employed by the conspirators in the transportation of liquor from boats offshore to land, but this testimony was not sufficient to connect him with the conspiracy, and was not competent for that purpose \* \* \* It will thus be seen that the only competent testimony tending to connect the appellant Williams with the commission of the offense was the company he was found in, the giving of an assumed name at the time of his arrest, and the unexplained possession of a coat comparing in texture with a pair of pants found in an abandoned boat. Whatever suspicion these facts may give rise to, they are in our judgment legally insufficient to support a verdict of guilty."

See, also, *United States v. Bonazani* (2nd Cir. 1938), 94 F2d 570.

As it is pointed out in the Statement of Facts, appellant never had any participation in the nefarious activities of the other defendants. His association with them was as normal as the association of any person with his club members and friends. A verdict of guilty cannot rest on the presumption that "birds of a feather flock together."

**B. THE USE BY THE ALLEGED COCONSPIRATORS OF APPELLANT'S AUTOMOBILE DOES NOT ESTABLISH GUILT.**

The defendant Joe Martinez, who was president of the Pan-American Democratic Club (T.R. 140), once used appellant's car to deliver opium to a government informer (T.R. 276) and defendant Jerez once used it for the same purpose (T.R. 99).

It is not necessary to cite cases to the effect that if one's property is used without his knowledge to further the unlawful designs of conspirators, the owner does not thereby become a member of the conspiracy. Nor is it necessary to cite cases to the effect that if one unwittingly and unknowingly is used to further such unlawful designs, he does not thereby become a member of a conspiracy. See *Canning v. United States* (9th Cir. 1941), 119 F2d 130; *Ching Wan v. United States* (9th Cir. 1929), 35 F2d 665. There was no evidence from which it can even be inferred that appellant knew that his car was used to transport narcotics.<sup>11</sup>

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(11) Even contribution of property with the knowledge that it will be used illegally does not necessarily make one a party to a conspiracy. In *United States v. Falcione* (1940), 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128, sugar was sold to illegal distillers, the sellers knowing it would be used in violation of law. The vendor was held not to be a party to the conspiracy of the buyers. This case probably expressly—at least necessarily by implication—overrules that portion of *Marino v. United States* (9th Cir. 1937), 91 F2d 691, 113 A.L.R. 975, relating to appellant Gullo. Gullo permitted his farm to be used in connection with a conspiracy to unlawfully import intoxicating liquors. This court held that that made him a co-conspirator. For a general note on this subject see 62 *Harvard Law Rev.* 276.



**C. MERE KNOWLEDGE BY APPELLANT THAT ALLEGED COCONSPIRATORS VIOLATED THE LAW DID NOT MAKE APPELLANT A CONSPIRATOR WITH THEM.**

**1. There Was No Evidence That Appellant Was a Confederate of the Co-defendants.**

As shown in the Statement of Facts, *supra*, government agents sought to make purchases of narcotics from appellant. On the two occasions on which he was approached he, in effect, replied: "There isn't anything in town until Art gets back. I will see that Art meets you" (T.R. 173, 218). This evidence is not sufficient as a matter of law or fact to convict appellant of conspiracy. Similar facts have been considered by the courts and they have so concluded. Thus, in *Morei v. United States* (6th Cir. 1942), 127 F2d 827, Dr. Platt was indicted with others for violation of 26 U.S.C. Sec. 2553 and for conspiracy. The lower court dismissed the conspiracy count. On the other count, Platt was found guilty. The Court of Appeals reversed, saying that on the following facts a motion for a directed verdict should have been granted:

Dr. Platt, who was on probation for violation of narcotic laws, was approached by a government informer who requested that he be given heroin in violation of the applicable law. Platt replied that he had none, but he gave the informer the name of Morei, the latter's address, and told the informer "to see Morei and tell him that the doctor had sent him and that 'he will take care of you.' " The informer contacted Morei and showed him the doctor's prescription blank with Morei's name on it. Morei unlawfully gave narcotics to the informer.

The Court said:

"There is no evidence that Dr. Platt planned with the other defendants or conspired directly or indirect-



ly with them, or had any understanding with Morei to buy or sell narcotics. There was no community of scheme between him and the other defendants. They shared in no common intent or plan, nor was there any prearrangement or concert of action. Dr. Platt was paid nothing and it is not claimed that he asked for any remuneration or expected to receive anything from the claimed transaction.”

In *Hubby v. United States* (5th Cir. 1945), 150 F2d 165 the appellant Hubby and one Akin were indicted for violation of laws relating to narcotics. Akin, who worked for appellant as a clerk in a hotel, pleaded guilty. Appellant was tried, found guilty, and appealed. A government agent testified that he and an informer approached Hubby at the hotel and asked how much they would be charged for a “big paper.” Hubby replied, “You will have to see Mr. Akin, he is across the street over there drinking coffee.” They saw Akin, who took them to the hotel. Akin went inside and came out with heroin, which he sold to the informer. It was held that these facts were insufficient to sustain a verdict of Hubby’s guilt of being severally and jointly liable with Akin for concealing narcotics.

The Second Circuit in *United States v. Di Re* (1947), 159 F2d 818,<sup>12</sup> affirmed in 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210, expresses the principle with these words:

“We have several times had occasion to consider what relation to a conspiracy makes a man a confederate \* \* \* and we have uniformly held that the prosecution must prove the accused to have associated himself with the principals in the sense that he has a stake in the success of the venture \* \* \* Even if Di Re had known that Buttitta and Reed were dealing

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(12) Clark, J. dissented.

in counterfeit ration coupons, there was not the slightest reason to suppose that he was himself either a seller or a buyer; or that he had any interest whatever in their enterprise \* \* \* Nobody would assert that all the spectators of a crime may be arrested as participants, and even though riding in a car [where the illegal sale of coupons took place] with two such offenders be evidence of acquaintance, or possibly friendship, with them, it would be altogether unwarranted to carry the inference further than complaisance (12).”

And in this circuit, the court said in *Weniger v. United States* (1931), 47 F2d 692:

“The failure of a person to prevent the carrying out of a conspiracy, even though he has the power so to do, will not make him guilty of the offense without further proof that he has in some affirmative way consented to be a party thereto. Neither will the commission of an overt act, though unlawful in itself, be enough to show that the actor was a party to the conspiracy. The law requires proof of the common and unlawful design and the knowing participation therein of the persons charged as conspirators before a conviction is justified.”

The authorities in accord with the doctrine of the *Weniger Case* are many. So, in *Dickerson v. United States* (8th Cir. 1927), 18 F2d 887, the court said:

“To warrant a conviction for conspiracy to violate a criminal statute, the evidence must disclose something further than participating in the offense which is the object of the conspiracy; there must be proof of the unlawful agreement, either express or implied, and participation with knowledge of the agreement.”

See, also, *Ventimiglio v. United States* (6 Cir. 1932), 61 F2d 619; *Thomas v. United States* (10th Cir. 1932), 57 F2d 1039; *Cartello v. United States* (8th Cir. 1937), 93 F2d 412; *United States v. Koch* (2nd Cir. 1940), 113 F2d 982; *Turcott v. United States* (7th Cir. 1927), 21 F2d 829; *Simon v. United States* (6th Cir. 1935), 78 F2d 454.

**2. The Evidence Shows That if Appellant Participated in Unlawful Activities He Did So as an Agent for the Government and Hence Is Not Guilty of Conspiring with the Codefendants.**

The lower court determined that there was "certainly" not enough evidence to sustain the charges that appellant imported narcotics into the United States, or assisted in so doing, or that he received or concealed or facilitated the transportation and concealment thereof; and the lower court determined that appellant did not sell, distribute or give narcotics away (T.R. 255). However, the court permitted the jury to decide whether or not the appellant conspired with the defendants to do one or more of these unlawful acts. The evidence does not show that he did. Looking at it in the harshest light from the standpoint of the appellant and in the most favorable light from the standpoint of the government, the most that can be said is that the appellant was a "confederate" of the government in its attempt to induce others to commit a crime. Assuming (as it reluctantly must be assumed on this appeal) that the government informer Colbert, a felon and a drug addict (T.R. 218), asked the appellant where he could get narcotics, urging that he needed them badly (T.R. 217) because he was sick (T.R. 274) and assuming that the government's "professional witness" (see the testimony, T.R. 138 et seq.) asked where he could get narcotics (T.R. 173), saying that he needed it badly (Id., 173);

and assuming that appellant said, "You will have to wait until Art gets back"—assuming these as postulations, the only deduction is that appellant knew someone who could help the government witnesses and that he aided those government witnesses in their plan. Assuming all this to be true it is apparent that the appellant was not conspiring with the other defendants. The indictment did not charge appellant with conspiring with agents of the government to buy narcotics; and the facts do not show that he conspired with purported sellers. The case of *Lambert v. United States* (5th Cir. 1939), 101 F2d 960 discusses the point. There, the appellant Lambert aided one Christian in illegally obtaining morphine. Lambert was charged with the Hargroves, senior and junior, of conspiring to sell narcotics to Christian. Said the court:

"Appellant could have been guilty of conspiring to sell, and also of aiding and abetting in the sale. The difficulty here is with the proof. All that it shows is that appellant acted with Christian in his efforts to purchase. It does not show that he was in any sense acting in concert with the Hargroves, the sellers. His concert was with Christian, the purchaser, not with the Hargroves, the sellers. Under the evidence he could no more have been held guilty of a conspiracy to sell, than could Christian \* \* \*

"Proof \* \* \* that one was acting with the buyer to effect a purchase, is not proof that he was acting with the sellers to effect a sale. Every fact and circumstance in the record points to appellant as an aider and abettor of Christian; not a single one points to him as an aider and abettor of the Hargroves."

(Note: one judge dissented).

The fact situation is no different in principle than others commonly experienced. During Prohibition Days a reputable respectable person would tell another the address of the nearest "speakeasy"; during the war, a housewife would tell another where "blackmarket" nylon stockings could be bought; today, a horse-racing enthusiast may learn from his neighbor the location of the nearest "bookie joint." All are condemnable. But the informant in the illustrations given is not necessarily a conspirer with the bootlegger or the black-marketer or the bookie (see, generally, 62 *Harvard Law Review* 276; 77 *Univ. Pa. Law Review* 535).

Admittedly, illicit dealings in drugs is more infamous than the transactions mentioned in the illustrations given. Prejudice results in the mere charge of selling drugs; and consequently the rights of the appellant should be more closely guarded.

**D. TELEPHONE CALLS TO THE HOME OF APPELLANT AND SUBSEQUENT MEETINGS BETWEEN A GOVERNMENT INFORMER AND ONE OF APPELLANT'S CODEFENDANTS HAD NO PROBATIVE VALUE IN ESTABLISHING APPELLANT'S SUPPOSED GUILT.**

The government created the impression that in response to three telephone calls narcotics were delivered by defendant Martinez to the informer Cobos. The facts, however, show the contrary. Exhibit 19—a jar of opium—was sought to be related to a telephone call made on January 15, 1949 (T.R. 226, 228). Cobos handed Exhibit 19 to the government agent Smith at 1:45 p.m. (The time element is probably accurate because the standard procedure is for the government agent to write the time of receiving an exhibit on the exhibit itself) (T.R. 110). But the telephone call was made at *about* 2:00 p.m. (T.R. 226). Assuming (in the interest of the prosecution) that it was made prior



to 1:45 p.m., nevertheless, Cobos did not meet the defendant Martinez, who purportedly delivered Exhibit 19 to Cobos, until *after* 1:45 p.m. (T.R. 226, 227). The only consistent conclusion is that this exhibit was turned over to agent Smith prior to the time Cobos met Martinez! There was nothing to connect the exhibit with the telephone call or with any of the defendants.

Exhibit 22—a jar of opium—was sought to be related to the telephone call made on February 6, 1949 (T.R. 228, 229). Cobos handed government agent Smith Exhibit 22 at 11:05 a.m. (T.R. 229). The facts show that some time *after* 11:00 a.m. Cobos met the defendant Martinez, who purportedly delivered Exhibit 22; that he was with the defendant for “ten or fifteen minutes”; that Cobos then walked down the street and met government agent Smith. It is obvious that Cobos did not leave the defendant Martinez until *after* 11:05 a.m. (T.R. 229). The only consistent conclusion is that the exhibit was turned over by Cobos to agent Smith *prior* to the time Cobos met the defendant Martinez. There was nothing to connect the exhibit with the telephone call or with any of the defendants.

Exhibit 23—a jar of opium—was sought to be related to the telephone call of February 8, 1949 (T.R. 230, 231). Witness Smith testified to the incident of the call and a meeting between defendant Martinez and Cobos. The witness was handed Exhibit 23 and asked to identify it. He answered: “This is a jar of opium that was turned over to me \* \* \* by Cobos (T.R. 231). He did not connect it up with the telephone call or with any of the defendants.

The only discrepancy in the government’s evidence relating to the identity of 25 narcotic exhibits (T.R. 42) relates to these three exhibits. They are the only exhibits which have a speculative value in determining the guilt

or innocence of the appellant, the other exhibits having no value at all. Singularly, too, they are the only exhibits supposedly procured by the informer Cobos, who worked for the government on other investigations (T.R. 238) and who, without explanation, was not called by the government to testify.

As it is said in *Morei v. United States* (6th Cir. 1942), 127 F2d 827 in regard to the government informer Sargent, who did not testify at the trial:

“It may be observed that the failure of the Government to call Sargent, a most important witness in view of the disputed testimony, was unexplained, and, under the circumstances, every inference and conclusion must weigh against the contention of the Government on this phase of the case.”

In accord is *United States v. Di Re* (1948) 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210.

## II.

### **The Lower Court Erred in Permitting the Government to Introduce Into Evidence a Record of a Prior Conviction**

*The lower court erred in admitting into evidence government's exhibit No. 29, which is a certified copy of a judgment of the prior conviction of appellant, dated March 5, 1945, based on an indictment charging him with violation of laws relating to narcotics (T.R. 240). Appellant objected to its introduction on the grounds that it was "improper and immaterial; incompetent. It goes to the offenses which are not in issue at this time. It goes to impeach the defendant who has not at this time taken the witness stand" and it was too remote to be admissible on the question of intent (T.R. 239).*

In the case at bar the appellant was found guilty of *conspiring* to violate 21 U.S.C. Sec. 174 and 26 U.S.C. 2554 (a).



Was the judgment of conviction of violating 21 U.S.C. 174 and 26 U.S.C. 2553, entered more than four years prior to the finding of the indictment now being considered, properly admitted? If it was not, the case should be reversed for obviously it was of extreme prejudice to the appellant and no kind of instruction to the jury could render the error harmless.

The question of the admissibility of prior offenses to prove knowledge or absence of mistake is difficult of presentation. Wigmore (II *On Evidence* (3rd Ed.) Sec. 302, page 200) finds "bewildering variances of rulings in the different jurisdictions and even in the same jurisdiction in cases of the same offense." In "The Rule of Exclusion of Similar Fact Evidence: America" (1938), 51 *Harvard Law Review* 988, the author Julius Stone writes that there are a "thousand or so" decisions on the subject. He, too, finds irreconcilable conflict.

The cases, however, fall generally into a pattern. The law most uniformly recognized is thus expressed in *Smith v. United States* (9th Cir. 1949), 173 F2d 181:

"The normal rule, excepting possibly sex offenses, is that evidence of such acts [specific acts of criminal misconduct] is not admissible for the sole purpose of tending to prove the defendant committed the crime charged, i.e., to show more likelihood of guilt. The inquiry is not rejected because such evidence is irrelevant, but to the contrary, it is said to weigh too much with the jury to over-persuade them so as to prejudice one with a bad general record and so deny him fair opportunity to defend against a particular charge. It affords the jury an extraneous ethical justification for a finding of guilt."

\* \* \* \* \*

"The common *exceptions* to the normal rule above stated are: (1) motive, (2) intent, (3) absence of mis-

take or accident, (4) underlying scheme or design embracing the commission of two or more crimes so related to each other that proof of one logically tends to establish the commission of the crime charged, (5) identity \* \* \*".

The court points out, too, that where the accused introduces evidence of good reputation, commission of crimes may be shown by the prosecution.

Application of the rule is seen in *Crowley v. United States* (9th Cir. 1925), 8 F2d 118. There, the plaintiff in error was tried for conspiracy to violate the National Prohibition Act. The court admitted testimony that seven months prior to the alleged formation of the conspiracy the plaintiff in error had been caught with liquor in his possession. This court held that the evidence was inadmissible and that the error required reversal, saying:

"It is not doubted at all that in a conspiracy case, where the evidence tends to prove that the defendant and one or more persons have entered into a common scheme to commit a crime such as unlawfully to transport liquor, evidence of other like offenses, committed by defendant in carrying on the common enterprise, is relevant as showing the knowledge or intent of the defendant. But in order to make such evidence admissible, there must be such a showing of connection between the different transactions as raises a fair inference of common motive in each. \* \* \* Here there was no ground for any such inference."

In *Terry v. United States* (9th Cir. 1925), 7 F2d 28, the defendants were charged with conspiring to violate liquor laws at Allen's Wharf. It was held to be reversible error to admit evidence of violation of liquor laws at Bodega Bay some six weeks previously.

The exceptions prove the rule. Thus in *Gianotos v. United States* (9th Cir. 1939), 104 F2d 929 two offenses of illegal importation of narcotics were so inseparably connected that proof of one involved proof of the other. It was held not to be error to admit in evidence the facts of the importation for which the defendant was not tried. In accord are *Todorow v. United States* (9th Cir. 1949), 173 F2d 439; *Tedesco v. United States* (9th Cir. 1941), 118 F2d 737; and *McCoy v. United States* (9th Cir. 1948), 169 F2d 776. In *Henderson v. United States* (9th Cir. 1944), 143 F2d 681, a scheme was established and evidence of illegal acts in furtherance thereof were held to be admissible. In the case at bar, however, the violation of narcotic laws in 1945 was not a part of a "scheme" of the alleged conspiracy of 1948. It was not inseparably connected (or connected at all) with alleged conspiracy. It had no tendency to show a motive for appellant's alleged membership in the conspiracy. There was no relevancy to establish intent or knowledge or to show that appellant, if he was a member of the conspiracy, was not innocent of wrong doing. If the accused did the acts charged in Count 78, he was guilty of conspiracy regardless of whether or not he had previously violated the law. Consequently, the court erred in permitting the prosecution to introduce the record of conviction. *Lambert v. United States* (5th Cir. 1939), 101 F2d 960, *supra*.

The case of *Orloff v. United States* (6th Cir. 1946), 153 F2d 292 is probably contrary to the general rule. It is submitted that there the court misconceived the law relating to exclusions. The Court relied on *Kettenbach v. United States* (9th Cir. 1913), 202 F. 377. But that decision falls within a recognized exception. It was held

there that a series of erroneous bookkeeping entries in favor of defendants made during a period of seven years prior to the ones on which an indictment for violation of the National Banking Act was based were admissible. Such prior entries showed a scheme to defraud and detracted from the defense of accident or mistake. As pointed out in *Weiss v. United States* (5th Cir. 1941), 120 F2d 472, 122 F2d 675, one wrong bookkeeping error might be attributed to mistake; two errors might be; three might be. But as the number of errors increases so does the probability that errors were intentionally made. The logic of the case is good; but it is not applicable to the one now under consideration. The only relevancy of the prior conviction in the present case is to show the appellant's *propensity* to commit crime. And that is the very thing which the rule of exclusion of prior offenses is directed against. Thus, in *Michelson v. United States* (1948), 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168, it is said:

“The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.”

If the evidence of prior wrongdoing was properly admitted in this case then it follows that the "Rule of Exclusion" has been completely abolished.

### III.

#### **The Lower Court Erred in Admitting Hearsay Evidence**

*The Court erred in denying appellant's motion to strike the testimony of the government witness to the effect that he heard a government informer, after dialing appellant's telephone number, "talk to someone which he called 'Pirata' [appellant] in Spanish" (T.R. 228).*

*Appellant's counsel objected by saying "I move that be stricken as hearsay" (T.R. 228).*

*The Court also erred in permitting the same government witness to testify that on another occasion he saw the government informer dial appellant's number, speak in Spanish, hang up, dial the number of one of the other defendants, and heard the informer say, "Let me speak to Pirata." "He [government's informer] then carried on a conversation in Spanish which the name 'Pirata' was mentioned several times, and then hang up" (T.R. 230). Appellant's counsel raised the point by "I object to what he said as being hearsay" (T.R. 230).*

*The government informer did not testify at the trial.*

Hearsay evidence is defined as follows:

"Evidence is called hearsay when its probative force depends, in whole or in part, on the competency and credibility of some person other than the witness by whom it is sought to produce it." 31 C.J.S. 919

This is further brought out in 31 C.J.S. Sec. 188, p. 911. The admissibility of testimony of a bystander as to one side of a telephone conversation is covered by the rule relating to the admissibility of oral conversation, so that one who overheard a telephone conversation should be permitted to testify thereto, provided that he is able to identify positively the speaker.

The theory under which such telephone conversations may be admitted is thoroughly discussed in *Johnston v. Fitzhugh* (1919), 91 Ore. 247, 178 P. 230.

“If it is necessary to bind a particular person over the telephone, the identity of the person must be established to support the conversation but this may be done by means of circumstantial evidence. If it is established *prima facie* either directly or by circumstantial evidence that the conversation took place between individuals who could be bound by the same if carried on face to face, it is competent for a bystander to narrate that part of the conversation which he hears provided always that the statements which he heard are competent evidence.”

The test and the proof necessary to identify the parties is further stated in the *Johnston Case* above:

“Whether the conversation and participants are identified must, in the nature of things, depend upon circumstances of each case, where there is no direct statement that the voice of the individual at the other end of the line was recognized. But the principle is that the identification of the parties and the conversation may be proved, not only by direct, but also by circumstantial evidence. There must be at least a *prima facie* showing of a situation equivalent of what would be required if the participants in the conversation were face to face. In other words, the conversation must be such as would be admissible if those talking were in the immediate presence and hearing of each other, and it must be established *prima facie*, either directly or by circumstantial evidence, that the participants in the telephone conversation are persons whose utterances are competent evidence.”



It is the appellant's contention that there was no direct or circumstantial evidence showing that the witness Cobos was speaking to the appellant. The evidence showed that the witness Smith testified that he saw Cobos dial a number, which later was proven to be the telephone number of the appellant, and talked to someone in Spanish, using the name "Pirata" several times. Pirata was proven to be the nickname of the appellant and subsequent to these telephone conversations Cobos had narcotics in his possession.

There is no evidence direct or circumstantial that Cobos, the absent witness, was talking to this appellant or to any codefendant or to any person whatsoever. Yet the fact that the court permitted Smith to testify that he heard Cobos mention this appellant's name over the telephone was very prejudicial to the appellant in view of the fact that a jar of opium apparently came into the possession of the absent witness shortly after the telephone conversation.

The test given was whether or not the conversation would have been admissible had the parties been face to face. Supposing instead of a telephone conversation, Smith had seen Cobos talking to a person, the question would be whether or not Smith could testify as to what the absent witness stated to another person. This would clearly fall into the hearsay rule and would be inadmissible. A situation arose in *Poole v. United States* (9th Cir. 1938), 97 F2d 423 where a police officer attempted to relate a conversation made by an absent witness to the defendant himself, who failed to reply to the statement made by the absent witness. The court here held that the statement made by the absent witness was hearsay and inadmissible.



It is therefore the appellant's contention that first there was no proof to show who the absent witness was talking to and that further, the use of the appellant's name in the conversation was inadmissible and that the entire testimony should not have been admitted over the objection of the appellant and that the admission of this evidence was prejudicial to the appellant.

### CONCLUSION

The prosecution's case is based upon conjecture and inference on inference. There should be no straining to uphold the conviction. See Justice Jackson's opinion in *Krulewitch v. United States* (1949), 336 U.S. 440, 69 S. Ct. 716, 92 L. Ed. 790.

It is respectfully submitted that the judgment of the lower court should be reversed.

PAUL H. PRIMOCK

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By W. T. ELSING

*Attorneys for Appellant*

No. 12553

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IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

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ARNOLD ENRIQUEZ,

*Appellant,*

VS

UNITED STATES OF  
AMERICA,

*Appellee.*

Upon Appeal from the United States District Court  
District of Arizona

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BRIEF FOR APPELLEE

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FRANK E. FLYNN,  
*United States Attorney*

E. R. THURMAN,  
*Assistant U. S. Attorney*  
*Attorney for Appellee.*





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ARNOLD ENRIQUEZ,	}
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vs	
UNITED STATES OF AMERICA,	<i>Appellee.</i>

Upon Appeal from the United States District Court  
District of Arizona

BRIEF FOR APPELLEE

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STATEMENT OF PLEADINGS AND FACTS

This is an appeal by the appellant from a judgment of conviction rendered against him upon the verdict of a jury in the United States District Court for the District of Arizona, after a trial before the Honorable Dave W. Ling, District Judge, and a jury, and entered against the appellant on May 15, 1950. (T.R. 52, 53).

The Grand Jury returned an indictment on June 16, 1949 against appellant and five others, namely: Arturo C. Leyvas, Ray C. Leyvas, Connie Duarte, Arturo E.

Jerez and Joe Martinez. (1.R. 2). The indictment contained 78 counts, the first 77 counts charging substantive offenses in violation of 21 U.S.C.A. Sec. 174 and 26 U.S.C.A. Sec. 2554(a), nine of which related specifically to this appellant, Arnold Enriquez; and count 78 charging conspiracy to violate 18 U.S.C.A. Sec. 88 (1946 Ed.) and 18 U.S.C.A. Sec. 371. (T.R.2-37).

Appellant's co-defendants pleaded guilty, (T.R. 38-61). The trial of this appellant came on regularly on April 26, 1950, (T.R. 39) and on April 28, 1950, the jury returned their verdict, finding the appellant, Arnold Enriquiz, guilty as charged in Count 78 of the Indictment. (T.R. 45). At the close of the Government's case, the Court, on motion of appellant, entered a judgement of acquittal on all of the substantive counts, i.e.: Nos. 52, 53, 54, 64, 65, 66, 67, 68 and 69. (T.R. 53, 54). The Court denied a motion for judgment of acquittal on the conspiracy count 78. (T.R. 255).

The appellant's brief correctly shows the jurisdiction of the District Court and of this Court. (App. B. 1, 2).

This appeal challenges the sufficiency of the evidence to support the verdict and raises the question as to whether or not the Court erred in the admission of certain evidence, as set forth in appellant's Specifications of Errors Nos. I, II and III. (App. B. 10, 11).

The evidence showed that from on or about the 16th day of February, 1948, up to and including the 15th day of February, 1949, in Phoenix and vicinity, Government agents and informers made purchases of narcotics consisting of prepared smoking opium, yen shee, morphine hydrochloride and herroin hydrochloride directly from the co-conspirators of the appellant, there being 23 distinct transactions alleged in the indictment. (T. R. 94, 107, 110, 116, 118, 121, 123, 126, 143, 148, 152, 154, 155, 163, 170, 183 and 213).



The evidence showed that the Pan-American Club (formerly Pirata's Inn), located on the corner of 16th and Washington Streets, Phoenix, Arizona, was frequented by appellant and the co-defendants (T.R. 140, 142, 148, 147, 151, 172, 173, 174); and that appellant, Arnold Enriquez, who was also known as "Pirata," at one time had a series 6 license for Pirata's Inn, but that following his arrest, the license was transferred. (T.R. 291).

It was brought out in the evidence that the residence of appellant was 2022 E. Moreland, Phoenix, Arizona; that the green Cadillac car at all times mentioned was registered in the name of appellant (T.R. 103, 105); that the residence of two of the co-conspirators, Arturo Leyvas and Connie Duarte was 1030 E. Moreland, Phoenix, Arizona (T.R. 135, 136); and that appellant's green Cadillac car was frequently parked in front of 1030 E. Moreland (T.R. 119, 120, 129, 225).

It is shown in the Reporter's Transcript that plaintiff in open Court said: "We don't know whether Cobis will be here or not, so we can't use it." (T.R. 122). Appellant was asked on cross-examination, "Do you know where Charlie Cobos is now?", to which question appellant replied, "No, sir." (T.R. 287).

The facts show that on February 15, 1949, the day of arrest of all defendants, appellant's Cadillac car was parked in front of the home of Arturo Leyvas at 1030 E. Moreland, and the car, driven by appellant, was seen to depart from there about 2:45 a.m., and that Joe Martinez, one of the conspirators, and Mike Sandoval, a Government witness, were in the car at that time. (T.R. 129).

It was brought out in the evidence (T.R. 79,80) through the witness Viron A. Elkins that co-conspirator, Arturo Jerez (also known as "Colimo") drove up

to Elkins' real-estate office in Tempe in a green Cadillac sedan, identified as belonging to appellant, in November of 1948, and asked Elkins if he wanted to buy some smoking opium and, among other things Jerez told Elkins that there were two other parties in with him on the stuff, naming, Art Leyvas and "Pirata." Elkins further testified (T.R. 86) that Jerez ("Colimo") delivered opium to him in a green Cadillac sedan on July 22, 1948, and this transaction was witnessed by Robert W. Lorenz, Narcotic Agent, who had concealed himself in a nearby hiding place. (T.R. 99, 100, 106). Narcotic Agent, Earl A. Smith, testified that following the delivery of opium to Elkins on this same date, July 22, 1948, he saw the Cadillac belonging to appellant being driven by co-conspirator Arturo Jerez (Colimo) park in front of the small cafe east of Pirata's Inn and saw Jerez enter the cafe and return to the car and drive to the home of co-conspirator Ray Leyvas. It was further brought out in the testimony of Agent Smith that on August 19, 1948, during the time a transaction was being made between Jerez and Elkins, Smith saw appellant's cadillac sedan driven by Joe Martinez parked in front of the cafe and saw Martinez go into the cafe at the same time Jerez was in the cafe. (T.R. 221, 222).

The testimony of Okla W. Johnson, Government Agent, (T.R. 147, 148) brings out the fact that on October 10, 1948, appellant, accompanied by Colimo, came into the Pan-American Club and following a conversation between Colimo, Art Leyvas and appellant, a transaction was made outside the building.

The evidence further shows (T.R. 149, 150, 151) that on October 29, 1948, after considerable conversation at the Club between Jerez (Colimo) and Agent Johnson concerning the purchase of narcotics, later that same evening at the Club and while co-conspirators, Martinez

and Leyvas, were present, appellant "Pirata" came in and Johnson was called by Frank Colbert who told him Art Leyvas was ready to sell him some opium and that he should come with him right then to make the deal. When Johnson went back to check out of the poker game, appellant came up to him and said, "Go ahead, check out, Johnnie, I will take your place," urging him out of the game. Johnson left the club and the transaction followed.

The evidence further shows that on January 13, 1949, the witness Johnson went to the Pan-American Club and requested the Manager, Charlie Pacheco, to call appellant, Arnold Enriquez, which he did; and about two hours later appellant and Joe Martinez came into the club and talked to Johnson. Following Johnson's conversation with appellant concerning the urgent necessity of obtaining some stuff right away for his customers, appellant said, "There isn't anything in town, and you will not be able to get anything until Art gets back." and appellant further said: "I'd like to help you, but there isn't anything I can do until the stuff gets here." Johnson discussed his difficulties in obtaining the narcotics further with appellant, after which appellant left the club. (T.R. 172, 173, 174). After Johnson had finished two games of shuffleboard with Joe Martinez, appellant came back in and he said, "Johnnie, I know that Art is going to be back tomorrow night. If you will be here between 5:00 and 5:30, I will see to it that Art meets you right here." On the following day when Johnson went to the Club at 5:00 o'clock, he found Jerez (Colimo) was there. Colimo asked Johnson to go with him and when Johnson refused and said he was waiting for Art, Colimo said, "Well, Art is tied up and Arnold told me to come down." Johnson explained to Colimo why he didn't care to deal with him anymore and would only deal with

Art. Later on that afternoon, Arturo Leyvas came to the Club and Johnson explained to him that he did not want to deal with Colimo and Art Jerez said: "Arnold told me to contact you, but I was busy, and Colimo came down . . ." Later on that evening a transaction was made. (T.R. 174, 175, 176).

It was brought out in the evidence (T.R. 180) that on January 29, 1949, witness Okla W. Johnson, in accordance with a telephone conversation with co-conspirator Joe Martinez (T.R. 181), the said Martinez came to the Club and that the witness and Martinez had a conversation wherein the witness informed Joe Martinez that he was out of stuff and that he was trying to get ahold of some and that he thought that he'd call him and see what he could tell him and Martinez said, "Don't you know all of those fellows are in jail in California?" (T.R. 182).

The facts show that on or about January 21, 1949, the witness Mike Sandoval saw appellant at Arturo Leyvas' house at which time, Arturo Leyvas, Connie Duarte, Colimo and Martinez were smoking opium (T.R. 199); and that on or about February 25, 1949 (T.R. 285, 286) Sandoval, Arthur Leyvas, Arturo E. Jerez (Colimo) and Manuel Gomez went to Los Angeles to a prize-fight with appellant in appellant's car.

The evidence further shows through the testimony of Government witness Frank Y. Colbert (T.R. 217) that on the night of the prize-fight in Phoenix, January 12, 1949, appellant and Joe Martinez were there together and Colbert asked appellant if it would be possible to get opium that night and appellant told him that "there was nothing in town, that Art Leyvas would be back Friday and I would have to wait until he got back."

It was brought out in the evidence through the witness, Jesse J. Harris, Office Manager for the Mountain

States Telephone & Telegraph Company, Phoenix, Arizona, that the records showed Phoenix phone No. 4-3914 was listed in the name of Arnold Enriquez at 2022 East Moreland Street and that Phone No. 9-6327 was listed to Connie Duarte, non-listing, at 1030 East Moreland Street. (T.R. 246, 247).

The facts also show (T.R. 226) that on January 15, 1949, Narcotic Agent Earl A. Smith saw Charles Cobos, who was assisting him in the investigation, dial telephone No. 4-3914 at a drugstore located at the corner of Henshaw and South Central Avenue. After the telephone call, Cobos was searched and furnished with \$50 and said Cobos went to his home at 1018 South First Street and that shortly thereafter on said date, co-conspirator, Joe Martinez, and Ernest Hayworth, driving a black Cadillac sedan, stopped in front of the home of Cobos and Agent Smith saw Martinez get out of this car, knock on the door, and Cobos came out into the yard, and after a conversation, Joe Martinez handed something to Cobos and immediately thereafter Cobos turned over to the said Earl A. Smith and Agent Lorenz a jar of opium. (T.R. 227).

Testimony of the witness Smith (T.R. 228, 229) further shows that on February 6, 1949, he again saw Charles Cobos dial the telephone No. 4-3914 from the same drug store and he heard Cobos talk to someone he called "Pirata" in Spanish. Following the phone call, Smith searched Cobos and furnished him with \$50 and shortly after that, he saw Joe Martinez drive up in front of Cobos' house at 1018 South First Street, in a 1937 Chevrolet sedan, get out and knock on Mr. Cobo's door. Then Cobos and Martinez entered this car where they stayed for about 10 minutes. After co-conspirator Martinez drove off, Cobos walked down the street, followed by Agent Lorenz, and Cobos turned



over to Smith a jar of smoking opium; and then witness Smith drove rapidly across town to the vicinity of 2022 East Moreland Street, home of appellant, and saw Martinez parking the said Chevrolet car in front and enter the home of appellant; and that this happened immediately after the narcotics had been delivered by Martinez to Cobos and turned over to the witness.

Testimony of Earl A. Smith (T.R. 230, 231) further shows that he again saw Cobos dial telephone No. 4-3914 on February 8, 1949, heard him talk in Spanish and hang up; and then saw him dial telephone No. 9-6327, known listing of co-conspirator Connie Duarte, at which time, Cobos said in English, "Let me speak to Pirata." He then carried on a conversation in which the name "Pirata" was mentioned several times. Smith then searched Cobos and furnished him with \$50. He then saw appellant, with Arturo Leyvas sitting beside him, drive up to Cobos' house in a '47 Chevrolet automobile and saw Cobos come out of his house, get in the car with appellant and Leyvas and talk for about 20 minutes. Agent Smith then followed appellant and Leyvas back to 1030 East Moreland Street where they parked the said Chevrolet car in the driveway. In a short time, he saw Joe Martinez come out and get in this same car and that he, Agent Smith, drove rapidly back to 1018 South First Street and when he arrived there, saw Joe Martinez in this same car with Charlie Cobos. In a few minutes, Cobos got out of the automobile, was followed by Agent Lorenz and the witness met Charlie Cobos who turned over to him a jar of opium.

The record further shows (T.R. 240, 241) that the Government, over the objection of defendant, introduced into evidence a record of prior conviction of the appellant for violation of the narcotic laws of the United States, dated at Tucson, Arizona, March 5, 1945.

The record also shows that appellant elected not to commence serving his sentence. (T.R. 56).

## QUESTIONS PRESENTED

1. The evidence is not sufficient to sustain the verdict.
2. The Court erred in admitting evidence of the record of a prior conviction.
3. The Court erred in the admission of hearsay evidence.

## SUMMARY OF ARGUMENT

In answering appellant's arguments upon the Specifications of Error, we will discuss the points listed thereunder in the order in which they are presented in appellant's brief.

### ARGUMENT I. (App. B. 11-22)

#### THE FACTS ARE NOT SUFFICIENT TO SUPPORT THE VERDICT.

Specification of Error No. 1.—“The lower court erred in refusing to grant appellant's motion for judgment of acquittal on Count 78; erred in denying appellant's motion for a new trial; and erred in entering judgment on the verdict; for the evidence was insufficient to sustain the conviction.”

Argument I. is divided by appellant into the following parts:

- “A. Mere association with alleged coconspirators does not establish guilt.
- B. Use by alleged coconspirators of appellant's automobile does not establish guilt.
- C. Knowledge by appellant that alleged coconspirators violated the law did not make appellant a conspirator with them.
  1. There was no evidence that appellant was a confederate of the codefendants.



2. The evidence shows that if appellant participated in unlawful activities he did so as an agent for the government and hence is not guilty of conspiring with the codefendants.

D. Telephone calls to the home of appellant and subsequent meetings between a government informer and one of appellant's codefendants had no probative value in establishing appellant's supposed guilt."

Replying to the argument that the facts are not sufficient to support the verdict, appellee wishes to point out that the transcript of the evidence must be carefully considered in its entirety. If, from a perusal of the evidence, the only fact found therein was that the appellant merely associated with the alleged conspirators or that the co-conspirators used appellant's automobile in furtherance of their illegal transactions, or that appellant merely had knowledge that the alleged conspirators were violating the law, or that the appellant participated in the unlawful activities as an agent for the Government—it might be said on the specific acts taken alone that the appellant's position might be correct. However, from reading the evidence, we find that appellant, who had been convicted of a prior offense in violation of the narcotic laws of the United States and sentenced for a term of two years and six months on March 5, 1945 (T.R. 240, 241), can be presumed to have spent some time in confinement; and since the investigation of this case continued over a period of a year, commencing from on or about February 27, 1948 (T.R. 82), it would appear that appellant had not been out of jail too long before he was associating with the codefendants and co-conspirators in this case; and, in addition thereto, was loaning his green Cadillac sedan to them and having conversations with them at the Pan-

American Club (formerly Pirata's Inn); and it appears from the record that his association was more than casual in that he conferred with the co-conspirators and immediately thereafter opium would be delivered. There were also the telephone calls by Cobos to appellant's telephone number to a person called "Pirata", which was appellant's nickname, and a prompt delivery of opium after the said telephone calls by members of the conspiracy; and the fact that appellant was usually at the Club when the transactions were entered into for the purchase and delivery of opium; and further that appellant made arrangements for meetings between the Government's agnts and Art Leyvas which resulted in purchases and deliveries of opium; and the further fact that appellant was seen riding in an automobile with one of the co-conspirators immediately prior to the sale and delivery of narcotics by the co-conspirators; that appellant's Cadillac car was observed parked in front of the home of Arturo Leyvas and Connie Duarte, two of the co-conspirators; that on several occasions, appellant's green Cadillac car was observed being used by the co-conspirators to deliver opium to the Government informers; and gain, the evidence shows that subsequent to a telephone call by Charlie Cobos to appellant's telephone number, co-conspirator, Joe Martinez delivered opium to the said Cobos and that the said Joe Martinez, who was at that time driving a black Cadillac sedan, immediately after the transaction, parked said car in front of appellant's home and Martinez was seen to enter the front door of the premises. (T.R. 225-230).

The evidence is overwhelming that not only did the appellant have knowledge of the conspiracy but he took an active part in furtherance thereof, as reflected by the statement of facts of this brief.

The appellant, on page 7 (footnote 7) of his brief, states, in substance, that appellant's car was connected with narcotic traffic only twice in a period of a year. From the transcript of the evidence, we find that in addition to the two instances when agents Smith and Lorenz were eye-witnesses to two deliveries of opium made in appellant's car (T.R. 100, 221), that on two other occasions, these agents saw appellant's car being driven by co-conspirators to facilitate two other separate transactions (T.R. 221, 225); and the evidence further reveals that on six different occasions, on the days transactions were negotiated and immediately prior to and/or after each transaction, appellant was in contact with the co-conspirators either in person or by phone. (T.R. 147, 148, 151, 172-174, 226-231).

Appellant claims (App. B. 18): "The evidence shows that if appellant participated in unlawful activities he did so as an agent for the government and hence is not guilty of conspiring with the codefendants."

From a reading of the transcript of evidence, no foundation for any such assertion is found in the entire transcript of evidence and we are unable to follow appellant's theory on this point.

Appellant states (App. B. 20): "Telephone calls to the home of appellant and subsequent meetings between a government informer and one of appellant's codefendants had no probative value in establishing appellant's supposed guilt."

He bases his argument upon the discrepancy as to the time the witness Smith claims he received the exhibits and the time they were delivered to him by the informer Cobos. It may be that witness Smith was confused by the time element, but a reading of his evidence (T.R. 226, 227, 229) brings forth the fact that he told each step as it occurred in chronological order and the exhibits

were handed to him by Cobos subsequent to the telephone calls and the deliveries and the error in time in no way impeaches or detracts from Mr. Smith's testimony. Surely, the jury was justified in inferring from the said testimony that appellant took an active part in the delivery of the said narcotics.

Appellant (App. B. 22) calls attention to the fact that informer Cobos was not called by the Government to testify and asks this Court under the authority of *Morei v. U. S.*, 127 F2d 827, to weigh every inference and conclusion against the contention of the Government in that phase of the case. It will be noticed (T.R. 122) that the Government attorney made this statement: "We don't know whether Cobos will be here or not, so we can't use it"; and again in the testimony of the appellant (T.R. 287) the question was asked of him, "Do you know where Charlie Cobos is now?" to which question, appellant answered, "No, sir." Since appellant has seen fit to insert the element into his brief, we believe that we should answer it, and, in this regard, we state that this Court has the right to conclude from the record in this case that the Government would have produced Cobos had it been possible. It must be kept in mind that there was a period of one year, to-wit, from January 15, 1949 (T.R. 226) to April 26, 1950 (T.R. 61), between the transactions of Mr. Cobos and the date of the trial.

#### ARGUMENT II. (App. B., pages 22-27)

THE LOWER COURT ERRED IN PERMITTING THE GOVERNMENT TO INTRODUCE INTO EVIDENCE A RECORD OF A PRIOR CONVICTION.

Specification of Error No. 2—"The lower court erred in admitting into evidence government's exhibit No. 29, which is a certified copy of a judgment of the prior

conviction of appellant, dated March 5, 1945, based on an indictment charging him with violation of laws relating to narcotics (T.R. 240). Appellant objected to its introduction on the grounds that it was "improper and immaterial; incompetent. It goes to the offenses which are not in issue at this time. It goes to impeach the defendant who has not at this time taken the witness stand" and it was too remote to be admissible on the question of intent (T.R. 239.)"

In support of the introduction of the record of a prior conviction of the appellant, we cite the following:

"Conspiracy is essentially a crime of intent."

*Brittain vs. U. S.*, 60 F2d 772, 773

*Mackreth vs. U. S.*, 103 F2d 495, 496

*Landon vs. U. S.*, 299 Fed. 75, 78

*Pelz vs. U. S.*, 54 Fed. 2d 1001, 1005.

Proof of cinspiracy to violate the Federal law may be by circumstantial evidence, oftentimes by overt acts alone.

*Marino vs. U. S.*, 91 F2d 691-698, (9th Cir.)

This Court held in the above case that proof of a conspiracy may be by circumstantial evidence, oftentimes by overt acts alone, in which case much is left to the discretion of the trial court. In such cases great latitude is allowed and appellate courts will not reverse a case unless practical injustice has been done by the admission of irrelevant testimony.

Certainly, there is sufficient evidence in this case to support the conviction of the appellant under the rule as laid down in *Marino vs. U. S.* supra. The appellant on page 14 of his brief (Footnote 11), argues that the case of *U. S. vs. Falcone*, 311 U. S. 205, necessarily, by implication, overrules that portion of *Marino v. U. S.*, supra, relating to appelant, Gullo, wherein (page 699 of the opinion), it is set forth that Gullo permitted his premises to be used for storage and the re-canning of



the alcohol, and that such permission aided the purpose of the conspiracy and that the jury could properly infer knowledge.

In reading the Falcone case (pages 210, 211) it will be found that the case decided but one point and that was if one who sells materials knowing only that they are intended for use or will be used in the illicit production of distilled spirits but not knowing of the conspiracy to commit the crime is not chargeable as coconspirator. It is apparent that this does not, either by implication or otherwise, over-rule any portion of *Marino v. U. S.* (supra). It is obvious from reading the testimony in instant case that the appellant had more than mere knowledge of the conspiracy; in fact, he actually participated in it from beginning of the investigation to the end.

In further support of the introduction of the record of appellant's prior conviction, we cite the case of *Van Gesner v. U. S.* *Williamson v. same*, 153 Fed. Reporter 46 (9th Cir.) This case holds, in substance, that where the intent of the party is matter in issue, it has always been deemed allowable to introduce evidence of other acts and doings of the party of a kindred character in order to illustrate or establish his intent or motive in the particular act directly in judgment, provided that the Court, both in admitting it and instructions to the jury, limits the evidence to the question of motive (page 56 of the opinion). This particular case was appealed to the Supreme Court of the United States under the name of *Williamson vs. U. S.*, 207 U. S. 425. The Supreme Court sustained the lower Court (page 451 of the opinion) in the following language:

“The contention that the proof on the subject just stated should not have been admitted, because it tended to show the commission of crimes other than those charged in the indictment and consequently

must have operated to prejudice the accused, is, we think, without merit, particularly as the trial judge, in his charge to the jury, carefully limited the application of the testimony so as to prevent any improper use thereof."

An examination of the trial court's instruction to the jury in the instant case on evidence of a former conviction (T. R. 301, 302) is as follows.

"Now, evidence of a former conviction of the defendant for a similar offense was introduced in evidence. This was for a very limited purpose. However, I will read you an instruction in connection with that.

"The fact that the accused may have committed an offense at some time is not evidence that at a later time the accused committed the offense charged in the indictment, even though both offenses be of a like nature. Evidence as to an alleged earlier offense of a like nature may not therefore be considered in determining whether the accused did the acts charged in the indictment. Nor may such evidence be considered for any other purpose, unless the jury first finds that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the acts charged in the indictment.

"If the jury should find from the other evidence in (291) the case that the accused did the acts charged in the indictment, then the jury may consider evidence as to an alleged earlier offense in determining the state of mind or intent with which the accused did the acts charged in the indictment. And, where all the elements of an alleged earlier offense of a like nature are established by evidence which is clear and conclusive, the jury may draw therefrom the inference that in doing the acts charged in the indictment, the accused acted wilfully, and not because of mistake or inadvertance or other innocent reason."



Certainly, from a reading of the case of *Williams vs. U. S.*, supra, with the instruction above set forth, it is hardly possible to conceive how the evidence could have been prejudicial to appellant, for the court expressly warns the jury that the evidence of the prior conviction could in no way be considered until they had first determined from the other evidence that the appellant did the acts charged in the indictment and that the jury could only draw an inference therefrom that the appellant in doing the acts charged in the indictment acted wilfully and not because of mistake or inadvertence or other innocent reason.

It will be noted that at the time of the introduction of the said prior conviction (T.R. 239), the Court said: "Well, the general rule is that evidence of other offenses is admissiable on the question of intent." \* \* \* "It happened five years ago. It will be received and the Court will limit the effect by proper instruction." Certainly the court was careful at the time of the admissibility of the exhibit and in its instructions. Other cases that follow the same rule are:

*U. S. Bollenbach*, 147 F2d 199 (2nd Cir.)

*Boyd v. U. S.*, 1420 U. S. 450

*Marino v. U. S.*, 91 F2d 691 (9th Cir.)

*Hatem v. U. S.*, 42 F2d 40 (4th Cir.)

*Orloff v. U. S.*, 153 F2d 292 (6th Cir.)

The case of *Orloff v. U. S.*, supra, is a prosecution for conspiracy to violate Internal Revenue laws by aiding a transportation of tax paid liquor with intent to defraud the United States, and admitted testimony that accused was engaged in illicit liquor business 15 years before the period covered by the indictment and no limit is placed upon the power of the court to admit

evidence of prior similar transactions where a specific intent to defraud is an element of the offense.

*Kettenbach v. U. S.*, 202 Fed. 377 (9th Cir.)

*Sargent v. U. S.*, 35 F2d 344 (9th Cir.)

*Gowling v. U. S.*, 64 F2d 796 (6th Cir.)

We quote from the opinion in the case of *Gowling v. U. S.*, supra, (page 798) as follows:

Fourth. "We do not think that it was reversible error to permit the district attorney to cross-examine appellant touching either his former conviction under the Harrison Anti-Narcotic Act or his connection with Charles Frank. Appellant made no contention that Chatham and Caldwell, or either of them, placed the opium in his vest pocket, or that these officers did not find it there, but testified that he could not account for its presence; that it was not there when he left the vest in the room, and it was not placed there by him nor with his knowledge, and he insisted that the element of criminal intent was therefore lacking. He testified that he was not a drug addict; that he did not smoke opium; that he did not know that Mrs. Bussey smoked opium, and he explained his presence at the Bussey home by saying that he went there with his wife to arrange the adoption of the little girl; that his brief case, which was found, contained a shaving outfit; and that he had removed his coat and vest for convenience while shaving. His testimony raised the principal issue, that is, of criminal intent."

We have set out the above quotation for the reason that we believe that the facts in the instant case are similar in that the appellant has denied the association with the co-conspirators, denied that he had any knowledge of the conspiracy, denied that he ever delivered any narcotics to Charlie Cobos, denied having ever sold narcotics to anyone and denied that he in any way participated in the conspiracy. (T.R. 259 et seq.).

Certainly, from the evidence in this case and the position taken by the appellant in his denials, the principal issue was raised, that is, of criminal intent; and we believe that the Court committed no error in admitting the prior conviction record for that purpose as indicated by its instruction to the jury.

The appellant in support of his position on this point (pages 23, 24, 25 of his brief) cites several cases and we believe that it is pertinent to analyze most of them briefly.

The case of *Terry v. U. S.*, 7 F 2d 28, cited by appellant, shows that there was no instruction as to the purpose for the introduction of the prior act in any way limiting the purpose of the evidence and further there was no other evidence tending to connect the defendant with the conspiracy. This differs materially from the instant case, for the record of appellant's prior conviction was not introduced in the evidence until appellant had been connected with the conspiracy by other evidence; and the same can be said of *Crowley v. United States*, 8 F2d 118 (A. B. page 24). The case of *Tedesco v. United States*, 118 F2d 737 (9th Cir.) cited by the appellant, seems to be in line with the government's position in that the case holds that where evidence of a separate and independent offense is admitted in order to prove defendant's intent, the jury should be instructed as to the probative extent of the evidence so admitted and on page 740 of the opinion cites the case of *Williamson v. U. S.*, 207 U. S. 425, 451, with approval. The case of *Henderson v. United States*, 143 F2d 681 (9th Cir.), cited by appellant, holds that plain, clear and conclusive evidence is required to establish other similar offenses as bearing on accused's intent and affirmed the trial court for the reason that the court carefully instructed the jury that the evidence

was not to be considered by them for a purpose other than the question of defendant's intent, and cites the case of *Boyd vs. U. S.*, supra, with approval. There can certainly be no question as to appellant's prior offense since it was made positive by the conviction. The other cases cited by appellant on this point are based upon different fact situations from the facts in the instant case and, therefore, cannot be held to govern the ruling of the trial court in the case now on appeal.

We feel that the court committed no error in admitting the record of appellant's prior conviction in evidence for the purpose for which it was admitted.

ARGUMENT III. (App. Brief, pages 27-30)

### THE LOWER COURT ERRED IN ADMITTING HEARSAY EVIDENCE.

Specification of Error No. 3—"The Court erred in denying appellant's motion to strike the testimony of the government witness to the effect that he heard a government informer, after dialing appellant's telephone number, "talk to someone which he called 'Pirata' (appellant) in Spanish" (T.R. 228) \* \* \*.

The appellant claims that the court committed error in admitting the testimony of the Government witness Earl A. Smith (T.R. 226, 230) with respect to the telephone calls made in his presence by Cobos at the time Cobos dialed appellant's telephone number and the purported conversation that then took place.

The only conversation testified to by the witness was that he heard Cobos use Arnold Enriquez' nickname, "Pirata." This evidence, coupled with the fact that soon after the telephone calls and conversations, deliveries of opium were made and the further fact that witness Smith testified that after one of said calls, he saw appellant and co-conspirator Arturo Leyvas meet

Cobos at his house, showed, and the jury could infer, as it undoubtedly did, that appellant was instrumental in the delivery of narcotics and in contact with the co-conspirators in the case.

In support of the trial court's ruling on this evidence, we cite the following cases: *Blakeslee v. U. S.*, 32 F2d 15, (1st Cir.), which holds that evidence in conspiracy prosecution of telephone calls between defendants without identifying persons speaking was held competent. the case of *Wood v. U. S.*, 84 F2d, 749, (5th Cir.), holds that in prosecution for conspiracy to import alcohol, records of telephone calls from rooms and offices occupied by defendant were admissible to show constant communication between defendant and co-conspirators in corroboration of other testimony, although the nature of conversation was not shown. In *Takahashi v. Hecht Co.*, 64 F2d 710, (D.C.), on page 712 of the opinion it is said:

“The admissibility of testimony of a bystander who relates one side of a telephone conversation is governed by the same general rules of evidence which govern the admission of oral statements made in ordinary conversation.”

and further holds (page 712 of the opinion):

“Where it is established either directly or by circumstantial evidence that a telephone conversation took place between individuals who could be bound if the same had been carried on face to face, it is competent for a bystander to relate that part of the conversation which he heard, provided that such statements are competent evidence.”

We believe that the Court properly admitted the testimony of witness Earl A. Smith with respect to the above evidence and that the Court committed no error therein.

## CONCLUSION

We, therefore, respectfully submit that the appellant was afforded a fair and impartial trial and the verdict and judgment should be affirmed.

Respectfully submitted,

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for the District of Arizona

E. R. THURMAN,  
Assistant U. S. Attorney

No. 12,553

IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

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ARNOLD ENRIQUEZ,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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APPELLANT'S REPLY BRIEF

Appeal from the United States District Court  
District of Arizona

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No. 12,553

IN THE  
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VS.

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*Appellee.*

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**APPELLANT'S REPLY BRIEF**

Appeal from the United States District Court  
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---

**STATEMENT OF FACTS**

As will be shown below, the appellee in its brief on pages 7 and 8, does not interpret correctly the evidence relating to the Cobos' telephone calls.

There are other misstatements of fact. For example, the appellee recites that following appellant's arrest, appellant transferred a liquor license for Pirata's Inn (page 3). The implication is that this is an admission against interest. The record, however, shows that appellant was arrested on February 15 or 16, 1949 (T.R. 129). But any liquor license

he may have had was transferred by him some three years previously to February, 1949 (T.R. 290). Additional inaccuracies will be noted by the Court in its comparison of appellee's Statement of Facts with the Transcript of Record.

## ARGUMENT

### I.

#### **The Facts Are Not Sufficient to Support the Verdict**

In its reply to the argument under the first Assignment of Error, the appellee does not cite a single decision to support its theory nor does it challenge the correctness of any of the cases relied upon by the appellant. The probable reason is that the government is unable to find a case in which a court has sustained a judgment based upon such frail facts as are found in the one at bar, with the possible exception of *Marino v. United States* (9th Cir. 1937), 97 F.2d 691, 113 A.L.R. 975, insofar as the appellant Gullo was concerned. But it is again submitted that *United States v. Falcone* (1940), 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128, overruled the Gullo portion of the decision. The Supreme Court cited the *Marino Case* as being in conflict with cases from other jurisdictions and then adopted the views of the other jurisdictions. Obviously, this is an overrule at least by implication.

Appellee correctly states that "the evidence must be carefully considered in its entirety." Appellant agrees. And when that is done, it is apparent that the jury returned a verdict of guilty, after being out for eleven hours (T.R. 44), for the reason that the appellant had a prior record of conviction.

The appellant in his opening brief (page 20) stressed the discrepancy in the testimony of the government witness Smith. The appellee passes this off with the observation that the witness was probably "confused" (Brief, page 12). But it is a surprising situation to find a witness "confused" in regard to three events out of twenty-five, those three events being the only ones which the government contends are related to appellant; and those three events having transpired in the presence of a government employee, Cobos, who did not testify at the trial.

The court should accept the witness's testimony as he gave it; and therefore the court should conclude that the Cobos' Exhibits 19, 22 and 23 are narcotics which came from a source other than the members of the alleged conspiracy. If appellant is correct on this point, then whatever substance there is to the government's case—and it is submitted that there is none—vanishes.

In contradiction to appellee's statement in its brief (page 12), appellant believes that the record in this case bears out his statement that the Cadillac car, so often referred to, was used twice—and no more—in connection with narcotics (T.R. 99, 227). Appellee contends it was used four times. Reference is to T.R. 225. Nothing is found there which relates to any sale of narcotics. Reference is to T.R. 221. This is the same transaction referred to in the transcript at page 99. Appellee is assuming that if *two* witnesses see an individual do an unlawful act, the individual thereby commits *two* crimes.

It is also said in appellee's brief at page 12 that on six occasions the appellant was in contact with the alleged coconspirators, personally or by telephone, immediately

before or immediately after a narcotics transaction. References given by appellee to the Transcript of Record do not bear this out. Three of the six transactions involve the Cobos' telephone calls and Exhibits 19, 22, and 23 (T.R. 226-231). The testimony concerning these is not entitled to any credence; and, as the lower court pointed out: "You don't know who (he) called. (He) called a telephone number" (T.R. 254). That leaves three. One of these was an approach by a government agent to buy narcotics coupled with appellant's reply to the effect that appellant could not do anything for him (T.R. 172-174). That leaves two. One of these was when a government agent left the Pan-American Club to buy narcotics and the appellant appropriated his seat at a poker game (T.R. 151).

That leaves one. It, too, was at the Pan-American Club. The appellant was seen drinking in a group that included two of the codefendants. One of the codefendants left the group, joined the government witness, and went away with him to sell some opium (T.R. 147, 148).

The government agent testified that he spent a "great deal of time" at the Club (T.R. 147). The appellant, who owned the Club (T.R. 140), spent a great deal of time there, too (Appellees' Brief, 3). Under these circumstances, no inference can be drawn from the fact that the agent and the appellant happened to be at the same place immediately prior to the two narcotic transactions.

## II.

### **The Lower Court Erred in Permitting the Government to Introduce Into Evidence a Record of a Prior Conviction**

The government, in effect, is asking the court to abandon the rule set forth in *Smith v. United States* (9th Cir. 1949),



173 F.2d 181, and to sanction the use of records of prior convictions in all cases regardless of circumstances. Admittedly, *Orloff v. United States* (6th Cir. 1946), 153 F.2d 292, supports the government's contention. But it is submitted that that decision is contrary to the holdings in this Circuit; is contrary to the dictum in *Michelson v. United States* (1948), 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168; and is contrary to the long-established principle of safeguarding a defendant against unfair strategy to excite the passion of a jury against the accused. It is respectfully submitted that in the *Orloff Case*, the court would have been more candid and frank if it, instead of rationalizing, had merely said that this particular rule of exclusion would not be recognized in narcotics cases.

The other cases cited by the government either do not support its position or are distinguishable. In *Gowling v. United States* (6th Cir. 1933), 64 F.2d 796, the defendant had taken the stand and the court properly held that evidence of a prior conviction was admissible for purposes of impeachment. *Sargent v. United States* (9th Cir. 1929), 35 F.2d 244, involved a physician who was charged with unlawful sales of narcotics. It was properly held that evidence of numerous prior sales were admissible. The Court relied on *Casey v. United States* (9th Cir. 1927), 20 F.2d 752; *Williams v. United States* (5th Cir. 1923), 294 F. 682; and *Thompson v. United States* (8th Cir. 1919), 258 F. 196. All these cases hold that previous, related sales are admissible to show absence of mistake, scheme, and guilty knowledge. To illustrate: D, a doctor, is charged with unlawfully selling narcotics to W on January 15, 1950. It may well be that he intended to dispense a harmless drug but

by accident gave W morphine tablets. Such would be a good defense. To overcome it, the government would be entitled to show that every day from January, 1949 D dispensed morphine to A, B, C and E under the same circumstances that he dispensed it to W. Each transaction would go to negative the idea that the transaction of January 15, 1950 was actually a mistake. The case falls within the same class of Exception found in *Kettenbach v. United States* (9th Cir. 1913), 202 F. 377. Where one is charged with making a false bookkeeping entry, the prosecution is permitted to show other false entries for the purpose of establishing design and to eliminate the rationale of mistake. The same is true of *Hatem v. United States* (4th Cir. 1930), 42 F.2d 40.

The government also relies on *United States v. Bollenbach* (2nd Cir. 1945), 147 F.2d 199 and *Marino v. United States* (9th Cir. 1937), 91 F.2d 691. In the latter case, it is not clear just what the court did hold in regard to the proposition of law considered herein. In the former case, the court failed to state what the evidence of the prior wrongdoing consisted of or the circumstances surrounding such wrongdoing; consequently, the case is not helpful.

*Van Gesner v. United States* (9th Cir. 1907), 153 F. 46 and its companion case, *Williamson v. United States* (1908), 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278, are not in point. There, the defendants, fearful that a rival organization was acquiring leases to private lands for sheepgrazing purposes, unlawfully induced numerous "dummies" to file applications for entries on Federal lands under the Timber and Stone Act. Had the entries been allowed, the rival organization would have been deprived of grazing privi-

leges, water-holes, and the like. The government in its prosecution for conspiring to suborn perjury was properly allowed to expose the whole plot, even though in doing so evidence of other wrongdoing to promote the scheme was injected.

The only other cases of any interest cited by the appellee are *Mackreth v. United States* (5th Cir. 1939), 103 F.2d 495, wherein the court held that evidence of crimes for which the defendant was not indicted was inadmissible; and *Boyd v. United States* (1892), 142 U.S. 450, 12 S.Ct. 292, 35 L.Ed. 1077. In the *Boyd Case*, the facts show that while perpetrating a robbery, the defendants committed murder and were indicted and tried. Evidence of five previous robberies were admitted in evidence. Two were admissible to establish the identity of the defendants. The evidence of the other three contributed nothing toward the proof of the murder except the defendants' propensity to commit robbery. The Supreme Court reversed the judgment of guilty because of the erroneously admitted evidence, saying:

"Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. \* \* \* However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

## III.

**The Lower Court Erred in Admitting Hearsay Evidence**

The appellee, in attempting to sustain the telephone conversations mentioned in T.R. 226, 228, and 230, cites several cases.

The first case cited is *Blakeslee v. United States* (1st Cir. 1929), 32 F.2d 15. This case is of no value on the point raised by the appellant as here the Court admitted numerous telephone calls between two conspirators without showing any of the conversation itself. This was rightfully permitted to show communication between two conspirators without an attempt to show what the communication itself was. The Court said:

"We think it was competent, even if a remote fact, to show means of long-distance communication among the alleged conspirators. For this purpose the strict identity of persons speaking over the telephone was not necessary."

The next case quoted by the appellee is *Wood v. United States* (5th Cir. 1936), 84 F.2d 749, a case in the same category wherein the Court admitted evidence of numerous telephone conversations without the actual conversations themselves; and the Court held it was admissible for the purpose of showing communication between two coconspirators without the actual conversation.

The admissibility of the evidence of Mr. Smith watching Cobos dial a telephone number and then proving the telephone number was the telephone number of this appellant is not questioned. Appellant's objection is based on the conversation that Smith relates that Cobos stated in his presence. Cobos was not a witness at the trial and yet the

Court permitted Smith to testify that he heard Cobos mention the name "Pirata" many times and once heard Cobos say, "Let me talk to Pirata." The inference was left with the jury that he was talking to "Pirata"; and yet during the argument for the judgment of acquittal, the Court itself stated, "Well, you don't know who they called. They called a telephone number" (T.R. 254).

The United States District Attorney attempted to introduce evidence of Cobos' conversation and then stated "We don't know whether Cobos will be here or not, so we can't use it." (T.R. 122). Being fully cognizant of the fact that such testimony was inadmissible, the United States District Attorney stopped his own witness from testifying concerning the telephone conversation and transactions with Cobos.

Could it be, however, that realizing the full weakness and lack of evidence in the case against the appellant, that the United States District Attorney, before closing his case, proceeded to use the same evidence that he had heretofore voluntarily said was inadmissible? If such evidence was inadmissible at the beginning of the Government's case, it was certainly inadmissible throughout the entire case.

Without the presence of Cobos at the trial, every word Cobos said cannot be construed as anything except hearsay evidence. Mr. Smith, the witness, was testifying as to something that an absent person said not in the presence of the appellant. The appellant did not have the right or the ability to cross-examine Cobos as to what was said besides the word "Pirata" or to cross-examine Cobos to determine whether or not he actually talked to Pirata. Such testimony on the part of Smith was highly prejudicial to this appellant and being hearsay evidence constitutes reversible error.

**CONCLUSION**

Again, it is respectfully urged that this court should reverse the judgment of the lower court.

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